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THE BRITISH YEAR BOOK OF  
INTERNATIONAL LAW



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## IN MEMORIAM: DR J. H. C. MORRIS\*

(1910–1984)

IF a memorial service were merely an occasion for remembering, there would be little point in our gathering here today; for John Morris was a man whom none of us could possibly forget. Our purpose is not merely to remember but rather to commemorate one of the most distinguished academic lawyers of our time. That the force of his remarkable personality was harnessed for over forty years in the service of this College must be one of its greatest pieces of good fortune—or good judgement—in the present century.

Before his election as Fellow and Tutor in Law at Magdalen in 1936, John had had no previous connection with the College. In 1928 he had come as Holford scholar from Charterhouse to Christ Church to read law. Finding the tuition there somewhat less than satisfactory, the young John Morris quickly showed his strength of character by applying for a change of tutor. He was sent to T. H. Tylor of Balliol, and proceeded to achieve the distinctions that, in retrospect, we take for granted—two firsts and an Eldon Law Scholarship. Meanwhile he had joined Gray's Inn, where he was called to the Bar in 1934, and for the following two years he was engaged in pupillage and then in practice at the Chancery Bar. Fortunately for the academic world, he did not find practice to his taste; though those who, later, heard his powerful arguments on College and Faculty issues must have thought that his move to academic life had deprived the Bar of a very considerable advocate. There can be no doubt that it lost a draftsman of very great skill, as we can see not only from his scholarly works but also from the College statutes, which became for many years his special preserve.

In 1939 John married, and in the following year he and Jane went off to the war. They served in the navy, where John rose to the rank of lieutenant-commander in the RNVR. His first posting was to the Faroes as a member of the force sent there, after the German occupation of Denmark, to prevent those islands from falling into enemy hands. Later he helped with the preparation of tank landing craft for the Normandy landings. That task accomplished, he was released from the service in 1944, at the request of the College, under a special dispensation applicable (as he was fond of saying) to university teachers and bricklayers. From 1944 he worked in Oxford until his retirement in 1977, with only one substantial interruption from 1950 to 1951, when he was visiting professor at the Harvard Law School. It was a highly successful visit, and one that he greatly enjoyed.

\* The text of an address given at a Memorial Service at Magdalen College, Oxford, on 2 March 1985, by G. H. Treitel, QC, FBA, Vinerian Professor of English Law in the University of Oxford.

But it did not give him a taste for the modern fashion of academic visiting or migration. He did not accept any further visiting professorships until after his retirement, when he became Goodhart Professor at Cambridge and a Fellow of Caius College. This time a migration did ensue: John and Jane moved to Suffolk, close to their Cambridge friends but, alas, remote from those in Oxford.

Except for the war years and the last three years of his life, John was very much an Oxford figure; and his influence on College and Law Faculty matters was immense. He held strong views on many of the issues that came before those bodies and he argued for those views with all the force of his outstandingly incisive intellect. He fought vigorously for the principles that he believed in, but always with scrupulous fairness. That is why even those who disagreed with him recognized the integrity of his motives and never ceased to respect him. He won most of the arguments, but on the rare occasions on which he lost he did so with good grace. He had opposed the admission of women undergraduates to Magdalen, but, when finally defeated on that issue, observed that he could see just one argument in favour of the change. 'At least', he said, 'they cannot grow beards in their second year'.

John liked nautical metaphors: to understand an argument was to hoist it in, to utilize it was to take it on board, and to rebut it was to take the wind out of its sails. In the same language, law teaching at Magdalen when John arrived here was at a low ebb, and legal scholarship can most charitably be described as becalmed. The first signs of John's success in bringing about a turn of the tide became apparent even in the short period that he spent at Magdalen before the war. Within that time, too, he had founded the College law society, and no one now will be surprised to hear that its inaugural moot raised, among other points, a problem of torts in the conflict of laws. Shortly after the war, John persuaded the College to agree to the appointment of a second law tutor. Rupert Cross joined him in 1946 and together they formed an unsurpassed team.

One of the secrets of that success, and of John's contribution to it in particular, was that John was a superb organizer and a great team-leader: points that he had in common with the heroes of British Antarctic exploration, whom he much admired. His teaching was highly organized. Each week he would hand out typed or printed reading lists, and essay subjects or problems, all devised with the most meticulous care. The result was not only to save time, but above all to make it clear to the recipients exactly what was required of them.

The intellectual demands that John made of his pupils were high but never unreasonable: he was satisfied, but only satisfied, if a pupil did his best. He would insist that 'We cannot blame a man for being less clever than we thought he was when we admitted him'. But anyone who took shoddy work to him would feel thoroughly uncomfortable and know that he deserved to do so. Just what John expected his pupils to aim at became

obvious from the lectures and classes that he gave. They were models of lucidity, elegance and intellectual rigour. He seemed to get a special pleasure from taking complex legal topics and making them seem simple; in his hands the most arcane areas of real property and the conflict of laws came to acquire a sort of satisfying inevitability. In his later years he restricted his teaching to the conflict of laws; his lectures on that topic, and the related classes that he gave jointly with other members of the faculty, acquired an international renown and became an important cause of the high reputation of the BCL degree.

John's success as a teacher was to no small extent due to the close personal relationship that he developed with his pupils. Some, indeed, are said to have gone in trepidation to his tutorials, but none could fail to recognize that he was immensely kind to the young. Once that perception had dawned, it was impossible to feel nervous about tutorial encounters with John—though the fierce ginger cat that sometimes prowled into the room was quite another matter.

John became to many of his pupils something of a father figure, to whom they brought, not just their essays but a wide range of personal problems. He was as tireless in dealing with such problems as he was in helping pupils with the first steps in their careers, whether in practice or in teaching. All his pupils, too, will recall the warm welcome that they had at his home, first in the Longwall Annexe, and then, for some thirty years, in the delightful setting of Tubney Lodge. On such occasions, those who had gone to tutorials in some awe of John may have been surprised by his geniality, while all were delighted by the grace, vivacity and charm with which they were welcomed by Jane. From all this, there resulted a warm reciprocal relationship. John was proud of the achievements of his pupils; and they responded by the deep affection in which they held John and Jane, many of them becoming in later life their closest friends. A splendid manifestation of this affection occurred in 1968, when John's pupils entertained him and Jane to dinner in Hall and presented two portraits of him, the more formal of which now hangs in the College Law Library.

In his capacity as a scholar and writer, John can be compared with those great composers like Bach or Brahms, whose genius lay, not in originating new forms, but in bringing existing ones to perfection. As general editor of Dicey's *Conflict of Laws*, he retained the original format of Rule, Comment, and Illustration but made it, in the parts of the book for which he took personal responsibility, a vehicle for legal writing of a degree of incisiveness, subtlety and elegance unsurpassed in any of the great English practitioners' works. John once described the book as Dicey's *magnum opus*; in its recent editions it can with equal justice be described as John's own. Under his leadership Dicey, or Dicey and Morris as it was justifiably restyled from its eighth edition, became one of the most remarkable of English legal treatises. It transcended traditional boundaries, being as much respected in the courts as in the universities, and as authoritative in

other commonwealth countries as in England. For all this, the major share of the credit must go to John himself; for as general editor he set the standard for the whole team and, as time went on, he took more and more of the work into his own hands. But he was careful to preserve the character of the book as a team effort, partly because he enjoyed the debate that was generated in this way, and partly because he was anxious to provide for the succession. It is good to be able to record that the physical weakness from which John suffered in his last months had not in any way impaired the vigour of his intellect and that he was able to complete a supplement to Dicey and Morris only ten days before he died.

The conflict of laws was John's main academic interest and he published several other works on the subject—a students' book which ran into three editions, and a casebook which ran into four, to be superseded only last year by the new Morris and North book of *Cases and Materials*. He was also one of the editors of the title on conflict of laws in the most recent edition of Halsbury; and a member of the Editorial Committee of the *British Year Book of International Law* from 1947 to 1983. Given the extent of John's writings on conflict of laws, the significance of his contributions to other areas of legal scholarship becomes all the more remarkable. His work, with Barton Leach, on the rule against perpetuities will for long remain a model of all that is best in the art of writing legal monographs. He was editor of three editions of *Theobald on Wills*, general editor of one edition of *Chitty on Contracts*, and a substantial contributor to a further edition of the latter work. A modern specialist must marvel at the range of his achievements, especially as depth was never sacrificed to breadth. The volumes of which he was author or general editor, or to which he was a substantial contributor, number no less than twenty-three, an awesome achievement even in an academic career of over forty years. As if this were not enough, there are many important contributions to learned journals. John's articles on polygamous marriages and on the proper law of a tort are masterpieces of that much misused form of legal literature, the law review article. Both were highly influential, the one leading to legislation in this country and the other to much judicial development both here and in the United States. Two further articles on choice of law clauses in statutes have been similarly influential in much legislative drafting.

Although politically conservative, John had radical views about law reform, and these views found expression in his work for a number of law reforming agencies. His advice was sought by the Law Reform Committee before it issued the report that led to the Perpetuities and Accumulations Act 1964, an Act which to a considerable extent shaped the law in accordance with John's previously published views. And the Law Commission was indebted to him for advice on many aspects of the Conflict of Laws, advice which bore fruit in three important Acts of Parliament on matrimonial proceedings, domicile and foreign judgments.

John's principal hobby was sailing; and I like to think that navigation in the Gulf of Finland presented him with the same sort of challenge as that which drew him to the Rule against Perpetuities or to problems of Renvoi. The accounts of his cruises are a joy to read: they are written in the same unadorned and balanced prose that makes him, among legal writers, one of the leading stylists of the century. Another of his hobbies was to apply his analytical skills to works of fiction. His *Thank You, Wodehouse* is the only published example of this aspect of his personality but there is equally fascinating, though alas unpublished, material of the same nature on Dorothy L. Sayers. The argument has a delightful quality of self-parody, the familiar inevitability being achieved with tongue very evidently in cheek and being combined with those touches of humour that, in John's legal works, are largely banished to footnotes and indices.

John spent almost the whole of his professional life at Magdalen. Partly this was because institutions, no less than individuals, could evoke the intense loyalty that was part of his make-up; and partly it was because he liked to work, and worked best, in familiar surroundings. At no time was this predilection more strikingly demonstrated than in 1964 when he turned down the offer of the Vinerian Chair. I had rashly written to express my surprise and received a characteristic reply: 'My reasons for refusing the Vinerian Chair were really quite simple', he wrote. '1. I don't want to leave Magdalen; 2. I don't want to go to All Souls; 3. I knew that Rupert wanted it more than I did and I didn't want to stand in his way.' Nor did public appearances at guest lectures and conferences hold any temptation for him, so that he was personally known to relatively few outside his College and Faculty circles. But that did not prevent ample public recognition of his scholarly distinction: he was awarded the degree of Doctor of Civil Law at the unusually early age of 39; two years later, he became University Reader in Conflict of Laws; he was elected a Fellow of the British Academy, an Associate Member of the American Academy of Arts and Sciences, and an Honorary Bencher of Gray's Inn; and he was appointed Queen's Counsel. Here another quotation from his letters is irresistible: 'I don't really approve of academics accepting silk, unless they happen to be Professors of Public International Law.' The distinction that he probably valued above all others was his election to an Honorary Fellowship at Magdalen, timed to take effect immediately on his retirement, so that there should be no break in his connection with the College.

I have left to the last what John would surely have regarded as the most important part of this address—a tribute to Jane for the indispensable part that she played in all John's achievements and distinctions. When John and Jane were married, the role of a don's wife was still thought of as mainly a social one, and of course Jane fulfilled that role to perfection. But her contribution went much further than that. Members of all the editorial teams led by John know that they owe much to her; but only she herself now knows the full extent of that debt, for it was not her style, or John's, to

talk of such things. Generations of pupils and friends found it impossible to think of one of them without the other, and the effort to do so, which must now be made, will be a severe one indeed. And we shall all miss John's wisdom, his judgement, his vigour, his friendship and the warmth of a personality that seemed always to be, both literally and figuratively, somewhat larger than life.

G. H. T.

# GERALD GRAY FITZMAURICE\*

By SIR ROBERT JENNINGS<sup>1</sup>

## I. INTRODUCTION

FITZMAURICE, one of the greatest public international lawyers of his generation, enjoyed a long career which was almost from the beginning concerned with the study and practice of public international law. He read law at Gonville and Caius College, Cambridge, where he learned his international law from Arnold McNair of the same college. After five years of practice at the English Bar, he was in 1929 appointed an Assistant Legal Adviser to the United Kingdom Foreign Office. This was the beginning of a long spell in governmental service. He was principal Legal Adviser to the Ministry of Economic Warfare during the early war years, from 1939 to 1943; then he returned to the Foreign Office as Deputy Legal Adviser, and in 1945 he became First Legal Adviser, remaining in that high and responsible office until his election as a Judge of the International Court of Justice in 1960. There he served until 5 February 1973, discharging the duties of President for spells both in 1967 and in 1970. After his retirement from The Hague, he went on to serve as Judge of the European Court of Human Rights from 1974 to 1980. He was actively involved in important cases, as counsel or arbitrator, till his death in 1982, aged 80.

Thus he was almost throughout his long legal career a full-time practitioner; and although he frequently lectured, very successfully, not only to learned societies but also to undergraduate audiences—for whom he had a particular sympathy which they reciprocated—he never had a full-time academical appointment. Yet he was by nature a scholar; and he regarded being a good scholar as part of the job of a good legal adviser. Throughout his time as Legal Adviser in the Foreign and Commonwealth Office he managed to put out a constant stream of major articles and other publications. It was fortunate indeed that so very fine a scholar had both the inclination and the opportunity to devote his formidable intellectual powers so fully to international law.

Although Fitzmaurice had few peers for sheer volume as well as quality of pure academic writing, there is no single book by him of the kind one could go into a bookshop and buy as a separate publication. This is not at all to say that he wrote only single articles, or that he did not produce major sustained studies. On the contrary, there are several large-scale undertakings, all of them magisterial. There was, perhaps pre-eminently, the series of articles (in all, 640 pp.) in this *Year Book* on 'The Law and

\* © Sir Robert Jennings, 1985.

<sup>1</sup> Judge of the International Court of Justice; formerly Whewell Professor of International Law in the University of Cambridge; past President of the Institut de Droit International.

Procedure of the International Court of Justice':<sup>2</sup> a sustained commentary, in its own genre of unequalled excellence, which analysed the statements of principle in the Court's jurisprudence from 1950 until the series was brought to an end by his own election to the Court in 1960.<sup>3</sup> There was his superb 'General Course' at the Hague Academy, a book of 227 pages and again a model of its kind;<sup>4</sup> and also his earlier Hague Lectures on 'The Juridical Clauses of the Peace Treaties'.<sup>5</sup> There was also the long essay (168 pp.) on the future of international law in the *Livre Centenaire* of the Institut de Droit International, a work which was clearly intended in part at least as a testament of faith and intellectual conviction for those who, after him, would continue the work in that field to which his whole career had been dedicated.<sup>6</sup> For the rest, his published written work is to be found in several long articles or monographs; and also of course in his work on the law of treaties as Special Rapporteur of the International Law Commission.<sup>7</sup> Those are the works that will mainly be considered in this article, though some other shorter studies will also be referred to.

A complete view of Fitzmaurice's contribution to the science of international law would obviously have to cover not only his writings and lectures and addresses, but also his many, very full, opinions delivered as Judge of the International Court of Justice and also, later, as a Judge of the Court of Human Rights at Strasbourg; and, indeed, as arbitrator. But his work as a Judge has already been dealt with in two articles in this *Year Book*, both of them written before Sir Gerald's death by Mr Merrills: the first article deals with the work at The Hague;<sup>8</sup> the second with the work at Strasbourg.<sup>9</sup> Accordingly, no attempt is made in the present article to deal systematically with Fitzmaurice's judicial work, for that will be found in Mr Merrills's studies; nevertheless some reference must be made to his judicial opinions, for they form such an important and integral part of his thinking and writing.<sup>10</sup>

<sup>2</sup> This *Year Book*, 27 (1950), 28 (1951), 29 (1952), 30 (1953), 31 (1954), 32 (1955-6), 33 (1957), 34 (1958), 35 (1959). See also below. (It was indeed the intention to publish those articles in book form in several volumes. See *ibid.* 34 (1958), p. 1 n. 4.)

<sup>3</sup> After he himself became a member of the Court, he felt it would be inappropriate for him to continue with the series. He did not, however, hesitate to comment upon even his own judgments after he ceased to be a Judge; see, e.g., his article in the *Festschrift für Hermann Mosler* (1983), at p. 216 n. 24, where he refers to his own failure to make a certain point in a case at the Strasbourg Court of Human Rights, and comments: '*Mea culpa!*—for in neither of the cases of this kind occurring in his time did the writer take this point. "Mais le temps porte conseil."'

<sup>4</sup> *Recueil des cours*, 92 (1957-II), pp. 1-227.

<sup>5</sup> *Ibid.* 73 (1948-II), pp. 255-367.

<sup>6</sup> *Livre du Centenaire de l'Institut de Droit International 1873-1973*, pp. 196-363.

<sup>7</sup> *First, Second, Third, Fourth and Fifth Reports on the Law of Treaties* (Conclusion, Termination, Essential Validity and Effects of Treaties, and Treaties and Third States): UN Docs. A/CN.4/101, 107, 115, 120 and 130, published in volume 2 of the *Yearbook of the International Law Commission* for 1956, 1957, 1958, 1959 and 1960.

<sup>8</sup> This *Year Book*, 48 (1976-7), pp. 183-240.

<sup>9</sup> *Ibid.* 53 (1982), pp. 115-62.

<sup>10</sup> They will, in fact, be approached rather as Fitzmaurice himself approached Lauterpacht's opinions in his articles on 'Hersch Lauterpacht—The Scholar as Judge': see *ibid.* 32 (1961), at

Obviously, it will not be possible within the scope of the present article to deal adequately, or in many instances at all, with Fitzmaurice's views on all the very broad range of particular topics of international law that he examined and considered in his writings and opinions at one time or another; and indeed, for those who wish to be better acquainted with the content of his writings, there can be no substitute for reading them. Yet, throughout his work, no matter how technical or even narrow the topic under examination, it is invariably seen by him in its proper relation to general principle and to its place in the structure of the international legal system as a whole. Accordingly, his juristic philosophy, his profound understanding of the nature of international law, and his strong convictions about the nature of the task the international lawyer is called upon to perform, all shine out from even the most detailed pages. It is, accordingly, these qualities of Fitzmaurice's writing and thinking that must be the main theme of this article: not only in order the better to appreciate Fitzmaurice himself as an international jurist, but also because his understanding of these things is, when properly apprehended, of the first importance of itself.

## II. THE STUDY OF PUBLIC INTERNATIONAL LAW AS AN INTELLECTUAL PURSUIT

It will be well at the outset to note one quality of Fitzmaurice's approach to international law, which he would not have asserted as a part of his creed, but rather regarded as something to be taken for granted: that the task of the international lawyer is above all an intellectual one, to be pursued with exactitude and rigour. So there should never be any question of subordinating reason—juristic reason—and logic to expediency. Seeing public international law as an intellectual system governed by its own reasoning and logic—perhaps not unlike, in some respects at least, the system of pure mathematics, which so fascinated him by its intellectual elegance—he saw it as being imperative to be able to distinguish between juristic decisions and other kinds of decisions such as the political. The primary reason for this imperative was to preserve, develop and strengthen the intellectual *integrity* of the system, precisely because that integrity was also the primary source of its authority. For if it was not possible to distinguish the law clearly from other intellectual systems, how was it possible to ensure that the element of legal obligation attached?

It followed also from Fitzmaurice's intellectually disciplined approach to legal reasoning and legal decision that for him a primary test of good law was to be found in rigorous analysis, logic, and that consistency with the

p. 11, where he says he will not be concerned with the correctness or otherwise of Lauterpacht's decision in a case, but '... rather in the enrichment they afford to the whole *corpus* of the principles and general rules of international law, irrespective of whether Lauterpacht was right or wrong in his actual conclusion. If any indication of the writer's views on this latter question occasionally emerges, it will be exceptionally and incidentally.'

system as a whole which yielded predictability—again a primary requirement of good law. If a proposition could be shown to be *intellectually* specious—as he would have put it, ‘would not bear examination’—other argument for its rejection was merely ancillary. All this is evident from almost everything he wrote; but an explicit assertion of it is to be found in the first note to his Hague Academy General Course of 1957;<sup>11</sup> which also suggests that his classical education and learning had perhaps as much influence on his style of thinking and argument as had the not always very logical mystiques of the common law. Explaining why he has refrained from ‘footnotes of the kind that give numerous references to authorities and precedents’, he sees such citation of authority as otiose in an elementary course, but also as in any event unnecessary for ‘propositions the value of which depends more on their intrinsic merit, and on the soundness of reasoning on which they are based, than on the authority that can be advanced to support them’. Then he goes into the attack: ‘Even if authority were cited, its own value would, in the end, depend equally on similar considerations. If such propositions have any value, therefore, it must lie in themselves. . . .’ That footnote expresses something central to Fitzmaurice’s constant belief that juristic problems are intellectual problems and that only a law that satisfies reason will carry authority; and, moreover, that the preservation of the intellectual integrity of the system is, therefore, a *sine qua non* for the establishment of the rule of law in international affairs. And this, the furthering of the rule of law in international matters, was as we shall now see, the aim which is at the heart of all his work in international law.

### III. THE RULE OF LAW IN THE INTERNATIONAL FIELD

As a jurist, Fitzmaurice was a professional among professionals. Yet it must not be supposed that his remarkable dedication to public international law arose solely from the intellectual pleasure and fulfilment he undoubtedly and constantly derived from his mastery of the subject: he was above all committed, as an article of faith, to furthering, by his intellectual endeavour, the rule of law in the international field. His corpus of international law writings and opinions was consciously designed to serve that end. By ‘rule of law’, he said, was denoted ‘essentially the subordination of the will of individual States, in their dealings and transactions *inter se*, to the body of rules known and applied by international tribunals under the name of international law’.<sup>12</sup> This was the objective which it was the international lawyer’s high calling to serve. Accordingly, Fitzmaurice’s General Course at the Hague Academy in 1957<sup>13</sup>—a quite remarkable and most original work, judged even by the generally high

<sup>11</sup> *Recueil des cours*, 92 (1957-II), at p. 5.

<sup>12</sup> See ‘The United Nations and the Rule of Law’, a paper read before the Grotius Society at its meeting in Downing College, Cambridge, on 25 July 1952: *Transactions of the Grotius Society*, 38 (1953), pp. 135–50.

<sup>13</sup> *Recueil des cours*, 92 (1957-II), pp. 1–227.

standard of those courses—is devoted to the general principles of public international law ‘considered from the standpoint of the Rule of Law’. As he put it in his first paragraph:

In view of the impossibility of effecting any comprehensive survey of the general principles of international law within the allotted compass of this course, and the consequent necessity for selectiveness, some predetermined standpoint must be adopted from which to view the subject as a whole, if coherence is to be maintained and selectiveness is not to degenerate into an arbitrary choice. The standpoint which the author has decided, in consequence, to adopt, is that of the Rule of Law in the international field . . .

And he goes on to cite Article 14 of the 1949 Draft Declaration on the Rights and Duties of States:

Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

This ‘standpoint’ of the rule of law in international relations is the continuous thread not only of his Hague General Course of lectures but of his writings and opinions as a whole. Whenever he considers a question of international law it can be seen to have been thought through always with this standpoint in mind. The Hague course on ‘The General Principles of International Law’, however, confines itself to working out what are the implications of the idea of the rule of law for the basic principles of the system of public international law, selecting ‘for treatment those principles which appear to have the greatest importance from the standpoint of the rule of law in the international field, though it does group these in four main themes. Even so, the selection necessarily remains somewhat eclectic.’ His description of what is meant by a principle, and what is its place in the general scheme of things, is typically clear and illuminating:

By a principle, or general principle, as opposed to a rule, even a general rule, of law is meant chiefly something which is not itself a rule, but which underlies a rule, and explains or provides the reason for it. A rule answers the question ‘what’: a principle in effect answers the question ‘why’. In the event of any dispute as to what the correct rule is, the solution will often depend on what principle is regarded as underlying the rule.<sup>14</sup>

The first of the four ‘themes’ is ‘*automaticity*’; that is to say, ‘that international law is binding on States irrespective of their consent to be bound, whether they are existing members of the international community, or new members’.<sup>15</sup> This, a challenging viewpoint at the time it was written, leads into a discussion of the new State and into the question of recognition, and of the controversy between the declaratory and constitutive views of recognition; a controversy which is rightly said to reflect

<sup>14</sup> Ibid., p. 7 and n. 1.

<sup>15</sup> Ibid., p. 1.

differences 'as to the character of international law as a whole'.<sup>16</sup> Characteristically, Fitzmaurice proceeds, nevertheless, into an attempt to reconcile the two views; for he clearly saw such basic doctrinal differences not so much as a dialectical challenge, but rather as dangerous and unnecessary obstacles to further progress in the establishment of a clear rule of law in the field. The way to compromise had already been pointed by Lauterpacht<sup>17</sup>—often quite wrongly placed firmly in the constitutive camp by those who like views to be packaged and labelled—in his suggestive conclusion that recognition is 'declaratory of facts, constitutive of rights'.<sup>18</sup> This suggestion is gladly adopted and adapted by Fitzmaurice who, as his writings show over and over again, had a very great respect and admiration for the work of Lauterpacht and, though not by any means always agreeing with his conclusions, may be said truly to have regarded Lauterpacht as his 'master in the law'. Not that Fitzmaurice is impatient with the classical doctrines. He describes each with great care, setting out the objections and the virtues, before attempting their reconciliation in what is in effect a new view; for as will be seen many times in this article Fitzmaurice was never afraid of even radical innovation of established doctrine. Thus, although for him the clear understanding and exposition of important doctrinal differences was intellectually a requirement, so was their reconciliation if this were desirable for the better furtherance of the rule of law in the international field.

The first theme, of 'automaticity', also required discussion, in relation to the new State problem in particular, of the 'ultimate source of legal obligation'. The establishment of the rule of law being the ultimate goal, it was certain that Fitzmaurice would feel bound by principle to reject totally what he called the 'voluntarist' view, that States are bound by international law only because they have at some time consented to be bound, and that the consent may at any time be withdrawn: a view which he cogently states 'is easily seen to involve or amount to a negation of law as generally understood'.<sup>19</sup> To this notion he opposes the proposition that 'law is a social necessity' and that law 'is a necessary condition of any systematized form of inter-relationships'. What is of primary importance, therefore, is not the question of enforcement of a rule of law, but that a rule of law 'should be regarded as being in its nature obligatory'. That is what makes the rule of law, and so differentiates it from other rules.

People do not obey the laws of their countries merely because they know or believe that they will, if necessary, be made to do so. They obey them also, and chiefly, because they regard them as law—for the law is not obligatory because it is enforced: it is enforced because it is obligatory; and enforcement would otherwise be illegal.<sup>20</sup>

Accordingly, the essential element of international law is not consent, but

<sup>16</sup> *Recueil des cours*, 92 (1957-II), p. 7 and n. 1. <sup>17</sup> *Recognition in International Law* (1947), at p. 75.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Loc. cit.* above (p. 4 n. 13), p. 38.

<sup>20</sup> *Ibid.*, p. 45.

‘the element of necessity, or at any rate the recognition of a necessity’. Sir Gerald, further, makes the important point—and this is a good illustration of the capacity to perceive crucial distinctions—that the ‘failure always to distinguish between agreement as a source of the actual content of any particular rule of law, and as a source of the obligation to conform to that rule once made, still haunts a great deal of international thinking’.<sup>21</sup> The distinction is readily seen in the case of a treaty, which is brought into being by consent in the form of agreement; but, once made, the treaty is binding not just because of *that* agreement but because of the fundamental and antecedent rule of *pacta sunt servanda*. But the importance of this distinction must also be true of custom: it is ‘precisely because international law already makes consent a source of obligation that obligations can arise from such consent’.<sup>22</sup>

The second theme, which leads again to a fascinating and stimulating discussion, is that of the *supremacy* of international law. This demands at the outset that the questions of State sovereignty and domestic jurisdiction have to be faced.

States are sovereign; but this does not imply for them an unlimited freedom of action, or a right to engage in unregulated activity. What it means, in the case of fully sovereign States, is equality with and independence of *one another*—but not of the law. This, as has been seen, follows ineluctably from the nature of equality and independence itself; for, given the character of these concepts, States can only claim rights on the basis of being prepared to concede the same rights to other States and to assume the relevant obligations.<sup>23</sup>

But then there remains the problem that international law does not have rules governing every kind of even external State activity. And this leads to the famous question answered in one way by the Permanent Court of International Justice in its judgment in the *Lotus* case. The question of course is ‘whether, considering that in the international field [contrasted with the domestic field] large areas are, or may appear to be altogether unregulated’, the presumption should be that State activity is lawful except only where it is forbidden by a rule of law (as was the view of the Court in the *Lotus* case), or whether the activity is to be presumed to be illegal unless positively justifiable by a particular rule of law? Both sides of

<sup>21</sup> Ibid., p. 40; see also p. 43: ‘the tendency to confuse the source of the content of the rule with the source of the obligation to obey it’.

<sup>22</sup> Ibid., p. 41.

<sup>23</sup> Ibid., p. 49. There is added to the above cited passage a note too long to cite here so the first few sentences must suffice to whet the appetite: ‘It is fashionable to-day to regard sovereignty and equality not merely as *attributes* which at any given moment may or may not happen to belong to any given group: but as legal *rights*. The human impulsion towards this view can be well understood, although actually, it involves a number of serious logical and philosophical difficulties. However, if it be correct, it also has certain implications. If these are legal rights, then *ex hypothesi*, they must be rights derived from the law, and in claiming them each State must concede them to every other, as a matter of right also. The equality and independence of States would therefore, considered as legal rights, be something which States held from international law. . . .’ He goes on to cite Lauterpacht to the same effect.

this controversy, which Fitzmaurice regarded as resulting from a false antithesis, he rejected in favour of a third possibility:

namely that States must at all times act in good faith, in a manner consistent with the spirit of the system, and, on this basis, avoid action which is abusive in character, even though technically within the right of the State and not positively prohibited by any rule of the system.

Accordingly, 'international law needs to avoid either a presumption of legality or of illegality'.<sup>24</sup> And he goes on to elaborate the idea of abuse of rights as being therefore a necessary part of the principle of good faith: 'no system of law is in greater need than international law of developing and applying the maximum *sic utere tuo ut alienum non laedas* . . .'.<sup>25</sup> Moreover, there is, he says, 'a constant tendency for abuses of rights, or for potentially abusive situations, to give rise to new rules of law', thus filling some gaps in the system.<sup>26</sup>

Then, again as part of the theme of the supremacy of international law, comes a refreshing approach to the old argument between the monist and dualist doctrines of the relationship between domestic law and international law. Fitzmaurice is adamant in rejecting both doctrines, on the ground that:

. . . the entire monist-dualist controversy is unreal, artificial and strictly beside the point, because it assumes something that has to exist for there to be any controversy at all—and which in fact does not exist—namely a *common field* in which the two legal orders under discussion both simultaneously have their spheres of activity.<sup>27</sup>

International law certainly has supremacy over national law, 'but only has it in the international field', as for example in the rule that 'States cannot plead their domestic law as a ground justifying non-performance of international obligations'.<sup>28</sup> Nevertheless, international law simply does not necessarily, as such, have direct and immediate application in State territory. In so far as it may do so, this is the result of a provision of the national law. This radical view of the artificial and sterile character of the whole controversy Fitzmaurice does not claim to be his own but 'precisely' the view of Anzilotti, 'often miscalled a dualist'.<sup>29</sup> Fitzmaurice is also insistent that his own view is *not* a dualist view, any more than it is monist. He regards both as misapprehensions of the true position.

This same theme was a little later to be elaborated and illustrated in one of his articles on the jurisprudence of the International Court of Justice

<sup>24</sup> *Recueil des cours*, 92 (1957-II), p. 51. For discussion of the baleful effects of a supposed presumption that international law permits what it does not forbid, in particular regard to the law of the sea, and also to intervention, see 'The Future of Public International Law' in the *Livre du Centenaire 1873-1973* of the Institut de Droit International, pp. 196-363 at pp. 217-19.

<sup>25</sup> *Loc. cit.* above (p. 4 n. 13), p. 71.

<sup>26</sup> *Ibid.*, p. 55. Such propositions are, of course, not left in the air; they are always given concrete illustration in the text of the course.

<sup>27</sup> *Ibid.*, p. 71.

<sup>28</sup> *Ibid.*, p. 68.

<sup>29</sup> See a passage quoted *ibid.* at p. 72 from Anzilotti's *Corso di diritto internazionale*. Fitzmaurice, in the same section, gently, respectfully, but unanswerably disposes of the Kelsenian dialectical device of seeing the State as only an aggregation of individuals.

where,<sup>30</sup> after setting out a number of judicial pronouncements on 'The Supremacy of International Law over National Law', he adds the comment:

Unnecessary confusion has indeed arisen over this whole question, due to the failure to realize that international and domestic law move in different spheres or fields, that each is supreme in its own sphere, but that this does not of itself involve any conflict between them, precisely because the spheres or fields are different. In the domestic sphere, domestic law no doubt prevails, even if in 'conflict' with an international obligation (unless of course the domestic law itself provides—as it sometimes does—that in such a case the domestic law obligation is to give way);<sup>31</sup> but the supposed 'conflict' is immediately resolved and rendered non-existent because the domestic law obligation, while it may prevail in the domestic sphere, cannot override the international law obligation in the international sphere, in which international law prevails and national domestic law has no operation at all except in so far (the reverse of the coin) as international law itself enjoins or permits that it shall do so. In short, although a State may be *domestically* prevented from carrying out an international obligation and may actually not carry it out for that reason, it can never thereby obtain international absolution; and it is precisely for the breach of the international obligation thus committed that, on the inter-State plane and whatever the circumstances, the State incurs international responsibility for which it must make appropriate reparation. It is the erroneous supposition that international and national law move in the same field or on the same plane that could alone have given rise to any controversy on the subject of the supremacy of international law in inter-State relations. The whole of the largely sterile monist-dualist controversy has its root in this.

At this point in his article on the law and procedure of the International Court of Justice, Fitzmaurice then adds a citation from his Hague General Course that is so important—and Sir Gerald clearly thought it important—as a statement of this uncommon but very cogent view of the relationship between international law and municipal law, that it seems right to reproduce it here. It is as follows:

International and domestic law having no common field, there is no need, nor would there be any point in discussing whether their relationship is one of co-ordination, or of subordination one to another, or of mutual subordination to a common superior order. There is no more point in discussing the abstract question of supremacy in regard to these two legal orders than, as has been seen, there would be in discussing whether abstract supremacy lay with English or French law. Such a question is necessarily meaningless. Each is supreme in its own field, and all that matters for this purpose is that international law is supreme in the international field. The very question of supremacy as between the two orders, national and international, is irrelevant, as is also that of the existence of some superior norm or order conferring supremacy. National law is not and cannot be a rival to international law in the international field, or it would cease to

<sup>30</sup> This *Year Book*, 35 (1959), p. 183 at p. 188.

<sup>31</sup> At this point Fitzmaurice adds the note: 'But, of course, precisely in doing that it is still the domestic law which, domestically, governs.' (Other notes to the cited text are omitted because they are references back to the Hague General Course.)

be national and become international, which *ex hypothesi*, it is not. National law, *by definition*, cannot govern the action of, or relations with, other States. It may govern or fetter the action of its own State in such a way that the latter cannot fulfil its international obligations, but again, by definition only at the national level and without legal effect or operation beyond it. Formally, therefore, international and domestic law as *systems* can never come into conflict. What may occur is something strictly different, namely a conflict of *obligations*, or an inability for the State *on the domestic plane* to act in the manner required by international law. The supremacy of international law in the international field does not in these circumstances entail that the judge in the municipal courts of the State must override local law and apply international law. Whether he does or can do this depends on the local law itself, and on what legislative or administrative steps can be or are taken to deal with the matter. The supremacy of international law in the international field simply means that if nothing can be or is done, the State will, on the international plane, have committed a breach of its international law obligations, for which it will be internationally responsible, and in respect of which it cannot plead the condition of its domestic law by way of absolution. International law does not therefore in any way purport to govern the content of national law in the national field—nor does it need to. It simply says—and this is all it needs to say—that certain things are not valid according to international law, and that if a State in the application of its domestic law acts contrary to international law in these respects, it will commit a breach of its international obligations.<sup>32</sup>

The third theme of the Hague General Course is what Fitzmaurice calls the theme of '*unity and uniformity*'. Again, by logical deduction from elementary principle, we find him both clarifying and developing the difficult yet always topical problems of the proper nature and place of regional international law; 'the problem of the single recalcitrant State'; the *dicta* in the *Norwegian Fisheries* case on those questions, illuminated by analysis of the considerable area of agreement in the British and Norwegian arguments in the pleadings; the subjective element in the formation of custom;<sup>33</sup> the plea of exception and prescriptive rights; extra-legal pleas for exceptional treatment; breaches of the law and the problem of

<sup>32</sup> Sir Gerald follows this view of the relationship between international and national law consistently. Thus, for example, in his last published article, in the *Festschrift für Hermann Mosler (Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte)*, published in 1983, he gives 'Some Reflections on the European Convention on Human Rights'. Here he explains in a note (note 3 on page 207) what he regards as the relationship of the Convention and domestic law, as follows: 'In spite of the language of Art. 1 of the European Convention, which might appear to warrant a finding that a country's law, as such, and in principle, were contrary to the Convention, the better view seems to be that any breach of the latter arises from the particular act performed in the application of the law. Of course a law which, for instance, forbade all worship in church or—still more—legalized slavery, might seem *ipso jure* to be peccant. Yet strictly it would not be until people were physically prevented from going to church or were forcibly taken into slavery that a concrete breach would result. However, this view may be difficult to reconcile with Art. 1, although where the courts have administered the law honestly and correctly according to its own terms, it may also be difficult to say that there is a breach of the Convention unless that breach resides *en soi*, and in the very terms that the courts have applied.'

<sup>33</sup> Salted as always by that sureness and clarity of observation that is to be found in all his writing; for instance, on the question of the elements of custom: 'To argue, as some have, that if a rule carries a sanction it can be known for a rule of law, whereas if it does not, it is a mere observance of courtesy or other similar usage, is of course correct but begs the question' (loc. cit. above (p. 4 n. 13), p. 104).

change;<sup>34</sup> and the legitimate role of special circumstances in this connection.<sup>35</sup> It is not possible here to do more than thus to indicate the several important questions that fall for discussion under this theme of unity and uniformity. But even the bare list illustrates how Fitzmaurice, by power of logical analysis of a single general principle of the law, is able both to construct a consistent system of jurisprudence and at the same time to clarify a number of difficult practical problems that are constantly facing the practitioner of the law, whether in arguing before courts, advising governments or advising private clients.

The fourth and final theme is '*universality and ubiquity*', dealt with under two main headings:

- (a) Spatial or territorial aspect: international law applies to and provides a regime for every portion of the globe; and
- (b) Functional aspects: international law protects the right of each State to an exclusive living space in the shape of territory, to a population, and to the exercise of jurisdiction over that territory and population.

Under the first heading is an economical but comprehensive examination of the nature of territorial sovereignty and of the modes for its acquisition, and of the nature of title. This is for the most part descriptive, for in dealing with this area of the law there are several elementary propositions that have to be made clear. It should, however, be seen as being almost an introduction to the more detailed and technical but also very suggestive and innovative treatment of very important aspects of this subject in his examination of the implications of the *Minquiers and Ecrehos* case in his series on the jurisprudence of the Hague Court.<sup>36</sup> Nevertheless, the treatment in the Hague lectures of the elements of this important subject is, one might almost say unusually, complete; so the reader will find here careful attention given to questions which logically arise from the general principle under discussion—and which may also be at least potentially of considerable practical significance—but which have escaped treatment or sometimes even mention in standard works commonly consulted by practitioners. Thus there is a very interesting examination of the juridical regime governing territory that is *res nullius*, whilst it still remains *res nullius*.<sup>37</sup> Again, in the discussion of different kinds of territory, the

<sup>34</sup> Again, a characteristic entry into the problem: 'It is at this point that there arises one of the most striking and difficult paradoxes that exist in the international field—a paradox due to the absence of the legislator in that field, and to the dependence of international law on State practice for its development' (ibid., p. 113).

<sup>35</sup> One more example of the usefulness of thorough analysis is to be found in his treatment of the very difficult question of the apparent condonation in certain circumstances (prescription, etc.) of situations brought about by an illegal act, and how to rationalize those exceptions to the maxim *ex injuria non oritur jus*? One sentence from a valuable discussion must suffice: 'In the last analysis, what the law recognizes in this class of case, is not the rightfulness of a situation of illegality, but the fact that there is a double process at work, and it is the second element in this process which confers the right' (p. 121).

<sup>36</sup> See below at pp. 52-4.

<sup>37</sup> Loc. cit. above (p. 4 n. 13), pp. 140-4: Fitzmaurice mentions in a note that this question 'is little discussed in the text-books'. Yet it is obviously of considerable juristic interest; and indeed, once the

juridical position of ice-territory, i.e. 'territory' that is wholly ice, and not merely land covered with ice, and of 'ice ports', is tackled, leading to the conclusion that:

By the test of susceptibility to use and occupation, there is much to be said for treating them as being capable of appropriation in sovereignty; but the question must be regarded as unsettled.<sup>38</sup>

The second part—called the 'functional aspects'—of the treatment of the fourth theme deals with the proposition that 'international law protects the right of each State to an exclusive living space in the shape of territory, to a population, and to the exercise of jurisdiction over that territory and population'. This raises a number of large, difficult and controversial questions, such as the limits of State jurisdiction; the principle of non-intervention and its relation to self-defence; violations of territorial sovereignty; civil strife and the position of the third State; nationality and the nationality of claims. To each of these formidable questions—each of them representing a whole field of law deserving a course of lectures in itself—it was obviously not possible for Fitzmaurice to devote more than three or four or at most five paragraphs. One might reasonably expect, therefore, a series of useful 'nutshell' guides setting out the bare bones of these issues. Not so with Fitzmaurice! By no means avoiding the difficulties of each subject ('As to the concept of self-defence, this is almost incapable of definition . . .') he does succeed in each of these miniatures in enabling the reader to see more clearly how these matters are related to each other, or qualify each other, and how each is related to a general principle of law from which it flows and of which it is, or should be, an application. Of course this was only possible for one who was already complete master of the detail of each of the subjects.

There is another aspect of Fitzmaurice's thinking about the rule of law which emerges clearly not only from these final sections but from the course as a whole. Obviously, in dealing with difficult legal problems there are often choices to be made between different possible solutions, even whilst staying within the permissible framework of strictly juridical decision, and making sure that weak juristic grounds have not been allowed to prevail over stronger juristic grounds because of considerations of politics or expediency or the power, or weakness, of one of the parties, and so on: observing in fact all the conditions for correct juridical decision which Fitzmaurice, as we shall see more and more as we survey his thinking and writing, insisted upon always. But even after all that has been seen to, there may still remain choices to be made. It is precisely at this point that one of the most important characteristics of Fitzmaurice's thinking appears: that the choice is then, as far as may be, to be made 'from the standpoint of the rule of law'. That is to say, one should ask oneself which

matter is broached, one realizes that the consideration of this question must be essential to a proper understanding of *res nullius* in any context.

<sup>38</sup> *Recueil des cours*, 92 (1957-II), p. 155.

choice is, as far as one can reasonably see, the most likely on a long-term view—never a short-term view, for that would smack of expediency—to strengthen the rule of law in international affairs? Obviously one called upon to make such a decision of choice, whether as judge, or commentator, cannot expect always to get it right. And there are choices that Fitzmaurice has made where one might for this or that reason feel that his judgment of the right answer to a particular question was mistaken;<sup>39</sup> but the choice will be found to have been considered by Fitzmaurice from this standpoint of the furtherance of the rule of law. In this he was surely right. That is what a jurist, when acting in his capacity as jurist, ought always to endeavour to do.

The aspect of Fitzmaurice's work as a visionary and idealist in this matter of the rule of law, though always keeping within what he most strongly believed to be the indispensable disciplines of the system of international law, can be illustrated by an extract from a paragraph in which, in the penultimate chapter of the Hague course, he is introducing the general rule of international law in the field of protection of each State's right to its territory, to protect population, exercise necessary jurisdiction and so on. It will be seen that he is concerned not merely to describe, but also to show the way for international law to have a broader field of operation. He is, in fact, in the passage about to be cited, justifying the 'ubiquity' aspect of his fourth theme, the 'universality and ubiquity' of international law. After describing in general terms the basic rules of territorial jurisdiction, and of the conferment of nationality as being primarily a domestic matter, and also the limits and extent to which a State 'may validly purport to exercise jurisdiction over persons who are not its nationals or are not personally present in its territory', he continues:<sup>40</sup>

Taking all these factors into account, it can be said that international law demonstrates its ubiquity, not only territorially, by conferring a definite legal status on every portion of the globe, but also functionally, by a complete regulation of the spheres of activity of States. The term 'spheres' of activity is used advisedly. International law does not here and now effect a complete regulation of all State activity as such, for it is a characteristic part of the international picture, so to speak—as it exists today—that, having delimited the spheres of activities of States, international law then leaves each State free to act as it pleases within its own sphere, though subject to certain important conditions and limitations. At the same time, as was seen in connexion with the subject of domestic jurisdiction, there is no formal limitation to the extent to which, through appropriate processes of change, international law can assume the direct regulation of activities previously left exclusively to State regulation, as a matter of domestic jurisdiction. What is international law today only *in posse*, may become it *in esse* tomorrow. But when this occurs, the *modus operandi* is by an extension of the conditions, limitations and requirements imposed upon the general right of the State to do what it likes in its own territory; in respect of its own population; and within its

<sup>39</sup> Indeed Fitzmaurice himself has sometimes had second thoughts: see above at p. 2 n. 3.

<sup>40</sup> Loc. cit. above (p. 4 n. 13), pp. 167–8.

own sphere of jurisdiction. In order to survey the terrain completely therefore, it would be necessary first to consider in what way international law protects the right of each State to operate exclusively within its own assigned sphere; and secondly, to see what conditions and limitations international law imposes on this right. The second of these tasks can only be dealt with in this Course in barest outline; but the first, the question of protection, can be considered more fully.

And then finally in the last, short chapter of but four pages, entitled 'the limits of public international law', which is concerned essentially with private international law, he nevertheless demonstrates the relationship of private international law also with the 'rule of law in the international field' in this coda to the whole course:

In the manner outlined above, it is possible to regard, and so to speak, account for, the whole of the rules of private international law as a reflection, or part application, of the public international law principle of the minimum standard of justice in the treatment of foreigners and of private foreign rights and interests: so that, if, in relation to this matter, public international law appears to retreat from the international scene, it nevertheless remains as an underlying regulative force. It may leave the stage, but goes no farther than the wings. Yet—and here is the paradox—although the rules of private international law—that is to say the conflict rules of each State—discharge for that State an international duty, these rules have nevertheless undoubtedly been evolved by States, not specifically with a view to, or in the performance of, any international duty as such, but in their own national interest. This coincidence of national interest and international duty leads to the reflection that just as, in the private life of the individual, honesty is the best policy; just as in the work of the diplomat, sincerity is worth any artifice; so also is it true that in the international life of the State, the principle of conformity with international law, and obedience to the Rule of Law, which has been the *leit-motif* of this Course, remains in the final analysis nothing but a matter of the plainest national interest for every State.<sup>41</sup>

#### IV. THE RULE OF LAW AND JUSTICE

Whilst still on Fitzmaurice's central theme, the establishment of the rule of law in international matters, it is important to note how this must in Fitzmaurice's view qualify the notion of justice. He saw justice as the consistent application of the rule of law without respect to party. He saw consistency, predictability, and equality before the law as concomitants of the rule of law, and was suspicious of attempts to manipulate rules of law in pursuit of what might, on a short-term and immediate view, be supposed to be expedient or even fairer in a particular case between particular parties. For that led in what for him was the wrong direction, not the rule of law, but the rule of capricious, unpredictable, subjective—indeed essentially political as opposed to legal—decision. Certainly there was room for the latter kind of decision also; but not by courts or by international lawyers, purporting to apply the law.

<sup>41</sup> *Recueil des cours*, 92 (1957-II), p. 221.

This question of the relationship of the rule of law and justice, he dealt with trenchantly in the 1952 paper read to the Grotius Society.<sup>42</sup> His principal theme was the tendency, most unfortunate as he saw it, of the United Nations organs to deal politically with what were essentially matters already governed by law. In the course of that discussion, he is hard on the sorts of international lawyers who, in his view, tended not to appreciate the importance of standing firm on the rule of law. He castigates the 'idealist', as being 'the most dangerous of all the enemies of the Rule of Law', paradoxically just because his aim is to achieve 'justice', that is to say 'what he believes to be justice in relation to the particular case confronting him'.<sup>43</sup> The intention of the law must indeed be justice, Fitzmaurice concedes readily; but justice in the sense of:

the greatest general measure of justice over the whole field of the relations it has to deal with. But its *immediate* aim, or perhaps its method, is something rather different, namely order, system, regularity, certainty, precision; and last but not least, ascertainability. It is by achieving these things that law achieves justice in practice.<sup>44</sup>

There, indeed, speaks the authentic voice of Fitzmaurice. But let him continue on the same theme:

... the idealist who puts justice above law in matters where legal elements are involved, will usually automatically fail to do justice, because in fact the parties will normally have taken up their stand, or will have come to their existing position, on the basis that the law exists, that it is applicable, and that it will be applied. They may not take an identical view of what the effect of the law is, but they will each have had some view, in the light of which they will have acted, and which they will regard as determining their respective rights. To say to the parties at that stage that all this is irrelevant, and the matter must be determined by the light of nature, so to speak, is itself to work injustice.<sup>45</sup>

And again, an observation of great wisdom:

... justice is very seldom achieved by directly aiming at it: rather is it a by-product of the application of legal rules and principles, a consequence of the general order, certainty and stability introduced into human and international relationships through the regular and systematic application of known legal rules and principles, even if these rules and principles are not always perfect and do not always achieve ideal results in every case.<sup>46</sup>

<sup>42</sup> See above at n. 12 on p. 4.

<sup>43</sup> Fitzmaurice is here using 'idealist' in a quite special as well as pejorative sense. He was himself an idealist aiming at justice. In fact his real target in this denunciation is not idealism at all, but a possibly immediately convenient, nevertheless ultimately false, notion of what is justice.

<sup>44</sup> *Ibid.*, p. 145.

<sup>45</sup> *Ibid.*, p. 146.

<sup>46</sup> *Ibid.*, p. 147. It was also the strongly held view of Fitzmaurice, and entirely consistent with his general philosophy of international law, that it is an error to look 'only at the existing international scene without regard to the future'; see this *Year Book*, 51 (1980), at p. 118 (in his late article on the 'Non-appearing Defendant Government').

Furthermore, Fitzmaurice regarded it as the clear duty of every *lawyer* to bear these truths in mind and to act in the light of them. Where things went wrong, it might be because the lawyers 'have not, as lawyers, been single-minded enough, and have not resisted the temptation to stray into other fields'.<sup>47</sup> For this reason he was also very suspicious of the lawyer conciliator:

No one of course would deny that an agreed settlement of any issue, be it a dispute between States, or a controversy in a Committee [he was speaking in the context of United Nations Committees] as to the correct solution of a general problem, is the best settlement of all, if it can fairly or reasonably be brought about. But there are several things that must be said to the habitual conciliator. The first is that there are many differences of opinion that cannot in fact be settled by this method: the points of view are too far apart. Secondly, even if a settlement by agreement, or apparent agreement, is possible, a satisfactory and above all a lasting settlement is seldom achieved if important underlying issues of a legal character are left unresolved. If such issues are left unsettled, it is only a question of time before the dispute breaks out again. Countries will often accept a *juridical* settlement that goes against them, even if they think it wrong, just because it is a juridical settlement. This is not the case with a negotiated settlement which one of the parties may feel it has been over-persuaded or manoeuvred into accepting, particularly if that party thinks it was legally in the right. Thirdly, there are many cases in which it is not in fact possible to say what form a negotiated settlement could take until the legal issues have been investigated and determined, and where it is only on the basis of first ascertaining and defining the legal rights of the parties that a final settlement in fact becomes possible. It would seem therefore that conciliation is not an adequate method *per se* of dealing with international issues, if coupled with a neglect of the legal elements involved in those issues.<sup>47</sup>

This conviction that the good international lawyer is one who sticks strictly to his last—that in fact it is not possible for him to do the job properly unless he does—must now be taken rather further, because it has important implications concerning the difference between juridical decision and political decision; and on this matter, as we shall see in a moment, Sir Gerald found himself passionately opposed to a doctrine of the function of international law which was very modish in his time.

#### V. LAW AND POLITICS; AND THE WHOLE DUTY OF INTERNATIONAL LAWYERS

Fitzmaurice's ideas about the rule of law in international relations led logically to his strongly held convictions about the relationship of juridical decision and politics, and about the proper role of the international lawyer in regard to both. It is thirty years ago that he expressed the following uncompromising view on those matters:

<sup>47</sup> *Recueil des cours*, 92 (1957-II), pp. 142-4.

The social function which law has to perform is precisely that of supplying the legal element so necessary in international, as in human affairs, and so indispensable to a full and satisfactory consideration and settlement of the problems that arise. But the value of the legal element depends on it being free of other elements, or it ceases to be legal. This can only be achieved if politics and similar matters are left to those whose primary function they are, and if the lawyer applies himself with single-minded devotion to his legal task . . . By practising this discipline and these restraints, the lawyer may have to renounce, if he has ever pretended to it, the dominance or rule of *lawyers* in international affairs, but he will establish something of far greater importance to himself and to the world—the Rule of Law.<sup>48</sup>

This conviction of his has not infrequently been misunderstood if not misrepresented. He was not in the least unaware of the inevitable interaction at all times of law and politics; nor of the political importance of decisions whether taken on legal grounds or other grounds; nor of the need of the lawyer to be aware of the political significance of legal questions. It stands to reason that one who had through three momentous decades been a legal adviser to a government very much involved in international affairs, and for seven of those years its chief legal adviser, could hardly have lived in a jurist's ivory tower.<sup>49</sup> It was probably this experience of being constantly in the midst of sharp political issues, and advising both ministers and those in the United Kingdom Foreign Office at a 'political' desk, that made him so acutely aware that a court of law, and for that matter a legal adviser, should be seen to operate within a framework of juridical rules and principles; and in so far as he does not so be seen, his decisions will be recognized as political or quasi-political and, accordingly, however wise in themselves, will not be accepted as carrying the

<sup>48</sup> *Transactions of the Grotius Society*, 38 (1953), p. 149; cited also by Merrills in this *Year Book*, 48 (1976-7), at p. 239. It should perhaps be allowed that there is a degree of exaggeration in this particular passage; it should be borne in mind that this paper was read, to provoke a discussion, to a small group of people which included a celebrated and distinguished proponent of a very different view, Professor Myres McDougal.

<sup>49</sup> He had even learned a somewhat cynical view of the political side of government. In his essay of 1976 about the enlargement of the contentious jurisdiction of the International Court of Justice (see *The Future of the International Court of Justice* (1976, ed. Gross), ch. 13, pp. 461-98), he speaks reproachfully of: ' . . . the preference of almost all governments for the prosecution and settlement of international disputes by means of the political arts they understand, rather than the juridical ones they do not and tend to distrust, together with their dislike of the *commitment* entailed by recourse to arbitration or adjudication—a dislike which, paradoxically, is not exclusively bound up with the possibility of losing the case, real though that may be, but stems from the loss of all freedom of manœuvre once a dispute is fairly in the hands of a court or arbitral tribunal' (p. 463).

And again in the same article, he recollects those things ' . . . so dear to the hear of the politician—the processes of propaganda, persuasion, bargaining, lobbying, and the manipulation of votes'.

And again he refers to the 'beloved' forum of the General Assembly of the United Nations, where 'grievances can be ventilated and disputes prosecuted indefinitely, by means of techniques with which all concerned are familiar' (p. 464).

On the specific task of a governmental legal adviser see the very interesting review article in *American Journal of International Law*, 59 (1965), pp. 72-86; and on the task (in some ways quite different) of the legal adviser in international organization, see another review article in *ibid.*, 62 (1968), pp. 114-27.

inherent authority of the law itself, over and beyond whatever may or may not be the personal authority of the author of them. In so far as he is seen to be making political decisions, even though legal in form, his advice can always be rejected in favour of a different, and perhaps an opposed, political point of view. It may well be that the only advice or decision that can be given whilst still keeping strictly within the constraints of the law may be politically disappointing to some interested party or even to himself. But if he tries to compromise the law in the interests of political expediency of the moment, or perhaps in a mistaken endeavour to avoid disappointing a party, he will both forfeit the authority that the law will otherwise lend his decision or advice and at the same time weaken the law by making its impact less certain and less predictable.<sup>50</sup>

It is perhaps a little unfortunate that, in the effort to establish international tribunals, so much effort was devoted to the distinction between legal and political—or justiciable and non-justiciable—questions and disputes, rather at the expense of proper attention to the much more crucial distinction between legal and political determination of a legal dispute. A dispute that is *not* a legal dispute, that is to say one that is not reduced, or perhaps cannot be reduced, to specific issues of fact or law between the parties (of the sort that can be defined in ‘submissions’), admits only of some sort of political, or at any rate of a non-legal, determination; but a legal dispute admits of both a legal answer and a political answer. We have already seen that Fitzmaurice was entirely aware of both the importance and the virtues of political decision in some matters. But it was Fitzmaurice’s conviction that what is essentially a political answer should never in any circumstances be disguised as a legal one; and should never therefore be given by a court or other legal tribunal—unless indeed the parties had given it power to go outside strictly juristic considerations.<sup>51</sup> But he went further: he also drew the

<sup>50</sup> There is an echo of this truth that the application of the law is not a comfortable matter, and that someone often has to be seen to lose, in Fitzmaurice’s valedictory speech at the close of the oral proceedings in the *Beagle Channel* case: ‘... it is one of the more sombre aspects of litigation, and the Court is fully aware of it, that a decision given according to law is in principle bound, unless the circumstances are very exceptional, to disappoint one or other of the Parties’. See the bilingual version of the award published by the Chilean Government (1977), Annex V.

<sup>51</sup> See his essay entitled ‘Enlargement of the Contentious Jurisdiction of the Court’, which is chapter 13 of *The Future of the International Court of Justice* (1976, ed. Gross), pp. 461–98: ‘... for no tribunal that is a court of law, and not a disguised commission of conciliation, or that has been requested by the parties to decide on a basis of *aequo et bono*, can give decisions that can be welcomed with applause by both or all parties, all groups, or all shades of opinion, ideological or other’ (at p. 465).

And again, a more severe passage from page 467: ‘... But the criterion of confidence as being that feeling which is engendered by a firm expectation of a particular decision, passes over from the futile to the pernicious if it means a well-founded expectation of a settled policy on the part of a court of deciding certain categories of cases in a certain way irrespective of their individual legal merits, or of the legal merits of the policies to which the decisions give effect. Such a court is either packed or subservient, or both, and history affords all too many examples of the process. International tribunals have enough to do in battling against the enemy without the gates: they are lost if the enemy is once admitted within them. No tribunal that values its standing can afford to acquire the reputation of

conclusion that international lawyers ought to renounce ambitions in the political arena as long as they are, and have not ceased to be, professional international lawyers; and should devote themselves single-mindedly to a relatively narrow and technical calling, though certainly also one of the highest there is.

This aspect of Fitzmaurice's juristic philosophy comes out very clearly in the long essay on the future of international law commissioned to mark the centenary in 1973 of the Institut de Droit International, of which Fitzmaurice, sometime President, was one of its most devoted members, always believing in the high importance of the Institut and its work.<sup>52</sup> This essay—like much of his later work, freely salted with literary quotations, especially from the poets, whether in English, French or classical Latin—makes it very clear how Fitzmaurice, though always obedient to the international lawyer's professional discipline as he saw it, was also acutely sensitive to political context and political controversy. This indeed is precisely why he was so insistent that the international lawyer should stick to his last at least when acting professionally.<sup>53</sup> Perhaps nowhere in his writings is the combination of seer and idealist, and scholar and technician, more evident than in this essay.<sup>54</sup> It had the conscious aim 'to provide thought and discussion rather than to inform the already well-informed'.

having cases referred to it only when the result is a foregone conclusion. About decisions that are truly judicial, there can be no foregone conclusions.'

On this whole subject of the International Court of Justice, see also *Kansas Law Review*, 13 (1965), pp. 447–50.

<sup>52</sup> See *Livre du Centenaire 1873–1973*, pp. 196–363. And see also his Presidential address at the Edinburgh session of the Institut in 1969: 'We [the Institut] were once virtually alone in the field of the codification and development of international law. We are so no longer, and there are other bodies at work with more funds, time and staff at their disposal than we can ever command. Yet we retain one priceless asset. We remain one of the few codifying bodies that combines the highest qualifications with being completely disinterested—that acknowledges no paymaster, or any other master, except the law—that owes no allegiance except to its own ideals, and reflects no particular attitudes, regional interests, climates of opinion or special preoccupations. Such a body can never have less than a major role to play, if it will but play it. Let us therefore resolve that however much we may, or should, direct our endeavour into new fields of the law, still relatively unexplored by others, we must never abandon to others our basic work in existing fields—so that we can continue to contribute to maintaining there the highest possible professional standards': *Annuaire de l'Institut*, 53 (1969), pt. 2, p. 35.

<sup>53</sup> See his observation in *Ireland v. United Kingdom*, ECHR, Series A, No. 25 (1978), 58 ILR 188, where, in a separate opinion, he says (para. 17): 'Speaking purely as a jurist—(and in what other capacity can I or any member of a court claim to have a right to speak in adjudicating on a case?)—...'. This does not mean of course that the international lawyer can afford to be a mere specialized technician. It should always be remembered that Fitzmaurice himself was a polymath of remarkable accomplishment: well read in history, philosophy and mathematics as well as law; a student of language especially well acquainted with the English poets, with the literature and idiom of the French language and of classical Latin, both of which languages he loved as well as studied deeply all his life. He also knew his classical Greek. His wide reading shows, of course, in his later juristic writings, where he does not hesitate to employ an apt quotation from English or classical literature; or to mix legal argument and poetry.

<sup>54</sup> The full title is: 'The Future of Public International Law and the International Legal System in the Circumstances of Today'. With annexes (five of them) the 'essay' is 167 pages. At the outset, however, the author makes it clear that he will deal only with the *lex generalis*, i.e. the 'general practice' of States, conveniently but unsatisfactorily called 'customary international law', together with general principles: but not the *lex specialis* or *lex voluntaria*. And this because, characteristically, what he is really concerned with is 'the future of international law as a discipline'.

It was necessary to make a selection of topics, which selection must to some extent, as he himself observes, betray the predilections of the writer. Thus he excluded the whole of the orthodox law of war and neutrality; even though during the Second World War, as a legal counsellor to the British Ministry of Economic Warfare, he had more than a little to do with the classical law of naval warfare and of neutrality.<sup>55</sup> Nevertheless he does include such more topical matters as 'subversive activities, guerrilla operations, independence movements, insurgency and internecine affairs generally which, by one of those paradoxes in which our subject abounds, are usually, or often, treated as part of the law of "peace"'. But he felt able to relegate 'such matters as nuclear warfare, the limitation of armaments, and peace-keeping and the prevention of war' to an area which was 'primarily in the realm of politics rather than of law'; hardly the statement of one who was unaware of the importance of *political* decision-making! The work also, however, demonstrates his keen awareness of political and social problems, and that he even had a radical view of some of the ways in which they should be solved. Take, for instance, the following passage:<sup>56</sup>

But there are other fields in which it is becoming clear that the nation-state alone cannot assure the protection of the individual—even its own particular subjects or citizens—from the prospect of serious harm,—and where in the long run only international action, internationally organized and carried out, will suffice, since the mischief knows no natural boundaries, and cannot be kept out by any purely national barriers;—such things as over-population and its consequences in overcrowding, malnutrition and disease; the pollution of waters, rivers, seas and airspace; the over-exploitation and potential exhaustion of the earth's mineral resources and stores of fuel and power; the extinction of species and devastation of fish stocks; problems of drought, famine and hurricane damage; problems of poverty and under-development; the possible misuse of outer space; terrorist activities that cross all frontiers, and the hi-jacking of aircraft and other threats to the safety of communication; the traffic in arms, narcotic drugs and slavery; forced labour; migration, emigration, conditions of work and other labour problems, etc.

This is assuredly not the statement of the narrow, specialized technician blind to today's problems. Furthermore, Fitzmaurice does not just list the problems: he has things to say about the timing of changes and reforms, and the importance of introducing desirable or necessary changes soon enough. This timing of change, with the assumption that his reader also will be more than what McNair used to like to call a 'mere' lawyer, Fitzmaurice characteristically refers to as 'the lesson implicit in the legend of the Sibillyne Books':<sup>57</sup>

Again and again it has been seen to happen in the international field—legal no less than political—that a concession or a change made soon enough will produce

<sup>55</sup> See also his article, 'Some Aspects of Modern Contraband Control and the Law of Prize', in this *Year Book*, 22 (1945), pp. 73–95.

<sup>56</sup> *Livre du Centenaire*, 1873–1973, p. 260.

<sup>57</sup> *Ibid.*, p. 255; but again characteristically he adds a short note to help the reader recall accurately 'the point of the story, often forgotten'.

results which that same concession or change will be insufficient to achieve later on, and which can then only be purchased at a much higher price.<sup>58</sup>

Nevertheless, when discussing the International Court of Justice, he sees that the international lawyer's proper role in respect of these, or any other, problems is above all a professional one. Accordingly, he sees an important distinction between the kind of, what he calls, "'special pleader's' law", that tends to arise from 'cases that involve a highly political or ideological element or background, or which turn on points that are of a strongly emotive or sensitive kind in the prevailing current of opinion'; and, on the other hand, 'jurist's law', which turns upon 'predominantly juridical considerations, in a way that cuts right across what might be thought of as the natural dividing lines of geography or culture'.<sup>59</sup> The latter assertion is a significant one, especially as it is made not as a theory but as a lesson from Sir Gerald's long practical experience as a member of the Court. It is significant because it holds up this juridical professionalism as a practical way to cope with cultural, and geographical, divides. In short it is a condition for the attainment and conservation of universality as an essential element of public international law. Sir Gerald goes on, in the same passage, to give practical expression to this requirement of professionalism by insisting that it should be remembered, in all elections to the Court, that 'a substantial majority of its members should always consist of public international lawyers'.<sup>60</sup>

It followed from this appreciation of the need to cleave to the notion of 'jurist's law' as a discrete principle and method for the determination of disputes, that the notion of the so-called 'double standard' was seen by Fitzmaurice as jeopardizing the very existence of the rule of law in international relations; 'for it is not too much to say that whole fields of the law are being disrupted by this attitude'. And he speaks of the kind of demand, sometimes heard, that the law should be somehow interpreted or changed so as to deny a remedy or right to particular kinds of country, as 'a totally unjudicial process';<sup>61</sup> though it is of course also important to

<sup>58</sup> He gives, interestingly, as an example, the question of the breadth of the territorial sea, and the possibility that existed for governments 'in the period prior to the 1958 Law of the Sea Conference (and as some of their advisers urged), to agree to what is now seen as being for these days a moderate extension of that breadth—to 12 miles (or even 6 miles might have sufficed)—'. See *ibid.*, n. 138 on p. 256.

<sup>59</sup> *Ibid.*, p. 287.

<sup>60</sup> *Ibid.*, p. 288. See also the essay cited above in note 49 where he points out that: '... on the wording of Article 2 [of the Statute of the Court], it would theoretically be perfectly possible for a whole Court to be elected all of whom fulfilled, in the literal sense, the conditions actually specified in that provision, but none of whom had ever opened a book on public international law ...' (at p. 468).

The difference between juristic and other methods of reasoning was of course made by Brierly (*The Law of Nations* (5th edn., 1955), p. 67): 'Reason in this context does not mean the unassisted reasoning powers of any intelligent man, but a "judicial" reason, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid, for example, the consideration of precedents, the finding of analogies, the disengagement from accidental circumstances of the principles underlying rules of law already established.'

<sup>61</sup> *Loc. cit.* above (p. 20 n. 56), p. 232.

disengage the ever-present problem of peaceful change in the law—and judicial decision is one important way of making changes in the law within certain limits, and not only in public international law—from that of inconsistent or politically biased application of the law in respect of particular parties.

Nevertheless, Fitzmaurice believed strongly, even passionately, that 'the first function of any court is to *apply* the law rather than create it';<sup>62</sup> though he asserts, with an element of truth but also perhaps with an element of exaggeration, that 'we are fast reaching a position in which the principle of equality operates only to the detriment of the law-abiding'.<sup>63</sup>

Thus, it was Fitzmaurice's preoccupation to defend the juridical integrity of international law, as a complete and consistent system impartially applied, and, as far as may be, reasonably certain and predictable. He saw so clearly that the authority of the entire system ultimately depends upon the maintenance of that integrity. This conviction was the mainspring of his approach to the subject, both theoretically and practically. He suffered resignedly but sharply from the misunderstandings of some who mistook his insistence on juridical integrity for political naïvety and legal conservatism. Nothing could have been wider of the mark. Rather was it because he was acutely aware of the political need for change, and timely change at that, and, moreover, of the high political relevance of international law, that he saw so clearly the dangers, especially for judges, of trying to cut juridical corners in order to accommodate immediate pressures; and thus inevitably jeopardize the integrity, and therefore ultimately also the authority, of the very system which must be the vehicle of change.

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At this point mention should be made of Fitzmaurice's somewhat rough handling of the controversial book about treaty interpretation by McDougal, Lasswell and Miller, in a review published in 1971;<sup>64</sup> for this unusual treatment of an opposing viewpoint demonstrates not only Fitzmaurice's intellectual convictions about both the nature of international law and the job of the international lawyer, but also the passion with which he held those convictions. The review is sardonic in tone, and quite unlike the author's usual urbane preference for understatement and

<sup>62</sup> *Livre du Centenaire, 1873-1973*, p. 286: 'Since therefore the first function of any court is to *apply* the law rather than create it, the right approach, we would suggest, is first to impart the requisite degree of certainty to the law, by one of the means proposed or discussed above (paragraphs 68-69), even if this involves considerable changes or modifications.' So again it is clear that he was not in the least afraid of change but sought it. See also page 467 of the essay in *The Future of the International Court of Justice* (above, p. 17 n. 49) where he speaks of imparting 'greater certainty to the law by means of codification which, even if not in all respects ideal, will attract that broad measure of overall assent that alone can anchor rules, internationally, in the firm bed of authority'.

<sup>63</sup> *Livre du Centenaire, 1873-1973*, p. 240.

<sup>64</sup> *The Interpretation of Agreements and World Public Order. Principles of Content and Procedure* (1967). The review, entitled 'Vae Victis or Woe to the Negotiators! Your Treaty or our "Interpretation" of It?', appears in *American Journal of International Law*, 65 (1971), pp. 353-73.

elaborately courteous respect for other views and writings.<sup>65</sup> It is sprinkled with literary references, all of them calculated to add pungency. In fact it is obvious that Fitzmaurice had been exasperated by the book. So it is interesting to ask why this man, ordinarily the very model of serene detachment, was so angered by the thesis of the three distinguished authors.

There need be little doubt, of course, that Fitzmaurice was, not unreasonably, infuriated by the sociological argot in which the book is—apparently designedly and even in the learned authors' view necessarily—written: 'a highly esoteric private language—we do not say jargon . . .', observes Fitzmaurice. For one who had pre-eminently a sense of style, the ungainly pomposities of this 'private language', as well as its perverse opacity, must have hurt. But he also saw that the way to deal with that was to make fun of it. One short example must suffice: the learned authors opine that: 'The absence of indicia of explicit rationality in the promulgative arena need not, thus, necessarily indicate that explicit rationality was not employed in the cameral arena.' Of this Fitzmaurice says:

Being translated, this means no more than something like the following: 'Because a tribunal does not give reasons for its findings, this does not entail that it did not have and discuss any during its private deliberations,'—same number of words but several magnitudes clearer, we hope.<sup>66</sup>

It is also true that, quite apart from the language, the book's relegation of the treaty text to a relatively subordinate place amongst the 'pointers' to the right or desirable interpretation was hardly calculated to appeal to one who had so often been a negotiator, and meticulous drafter, of the texts of treaties.<sup>67</sup> So for Fitzmaurice an objectionable feature of the book must have been the advocacy of resort to any of a large number of 'pointers' to interpretation, of which pointers the learned authors seem almost to suggest that what is said in the actual text may be the least important.<sup>68</sup> Nevertheless, in an article written twenty years before, Fitzmaurice had discussed the different schools of treaty interpretation dispassionately, and had even seen some merit and relevance in the teleological, as distinct

<sup>65</sup> His footnotes show that, when writing on a particular topic, he had troubled to read what most other writers had had to say on the subject; and pertinent compliments, especially to some of the lesser-known authors, are frequent.

<sup>66</sup> p. 363.

<sup>67</sup> e.g. Chicago Civil Aviation Conference, 1944; Washington Committee for the drafting of the Statute of the International Court of Justice, 1945; San Francisco Conference, 1945; Paris Peace Conference, 1946; Japanese Peace Conference, San Francisco, 1946; OEEC Conference, Paris, 1948; Berlin Conference, 1954; Manila Conference, 1954.

<sup>68</sup> e.g. to quote from Fitzmaurice: 'The authors seem to see nothing strange in the idea that a Court should deliberately act in this way,—that is to say, ignore a clear pointer in favour of others less clear but, presumably, leading to a better result for *some* of the parties.' Also: 'But for our distinguished authors, to have to rely on the mere text of the treaty alone, without any other aid, amounts to a fate almost worse than death.'

It will be remembered that Fitzmaurice could find practical justification of his own attitude in the Vienna Conference on the Law of Treaties, where the primarily textual approach to interpretation was firmly embodied in Article 34 of the resulting Convention.

from the textual, school.<sup>69</sup> So the author's depreciation of the importance of the text, though Fitzmaurice was certainly vigorously opposed to it, could hardly have been the reason for his deep anger.

The cause of this deep anger and distress was the thesis that conscious and intentional policy-making was not only a permissible but even a desirable element in the process of treaty-interpretation by a court of law. To some extent this difference of view reflected, no doubt, a difference between the British and the United States experiences and attitudes towards the proper function of courts of law and indeed of lawyers. But the somewhat extreme lengths to which the three authors were willing to take policy-orientated 'interpretation' was totally contrary, as we have already seen, to Fitzmaurice's philosophy, not merely of interpretation of treaties but of the fundamental requirements for the establishment and development of the rule of law in international affairs. It is the measure of his total devotion to this end that he was so deeply offended by a view, in a work on international law, that seemed to him to jeopardize that aim. The situation was aggravated when it was being suggested that policy-making interpretation might be permissible, and preferable, even where it was clearly a departure from the policy of the treaty as it had been enshrined in the text of the treaty formally agreed by the parties to it; and that such a political 'interpretation' might be attained by a selection of 'pointers', which need not be the 'pointers' which were the strongest on *juridical* grounds. Hence of course the sardonic title of the review: 'Woe to the Negotiators! Your Treaty or Our "Interpretation" of it?' As Fitzmaurice remarks: 'It would not be *their* treaty that would emerge from the fray, but another that someone else thought was the one they should have entered into.'<sup>70</sup> And the gravamen, therefore, of Fitzmaurice's opposition to this thesis is his objections of fundamental principle to the notion that *judges* might, for reasons of subjectively preferred policy in a particular case, be justified in preferring a weaker to a stronger *juridical* ground of decision.<sup>71</sup>

<sup>69</sup> See below at p. 25 n. 72.

<sup>70</sup> See p. 368.

<sup>71</sup> See also the joint dissenting opinion of Judges Spender and Fitzmaurice in the *South West Africa* cases, *ICJ Reports*, 1962, at p. 468, where they set out what they regarded as the 'four major principles of law':

'3. The principle that provisions are *prima facie* to be interpreted and applied according to their terms, where these are clear and unambiguous in their expression of the intention of the parties, and that such terms can only be ignored or overridden (if at all) on the basis of some demonstrably applicable legal principle of superior authority. The principle of interpretation directed to giving provisions their maximum effect cannot legitimately be employed in order to introduce what would amount to a revision of those provisions.

'4. The principle that a Court of Law cannot correct past errors and omissions of the parties, and that it is not the province of a Court to place some of the parties in the same position as they would have been in if they had taken action they could have taken, but did not take, and even deliberately avoided taking.

'In our opinion, the judgment of the Court fails to give expression to these principles, either ignoring them or advancing no adequate grounds for departing from them—as in our view it clearly does. In the Anglo-Saxon legal tradition there is a well-known saying that "hard cases make bad law", which might be paraphrased to the effect that the end however good in itself does not justify the

It has been mentioned that twenty years before writing this review, Fitzmaurice had himself written, as part of the second of his series of articles on the law and procedure of the International Court of Justice, a superb twenty-five page exposition of the different theories of interpretation and how they had each fared before the International Court of Justice.<sup>72</sup> It is right to refer briefly to this article now because it shows how flexible and even innovative Fitzmaurice was in considering precisely this matter of treaty interpretation; provided always that the discussion were kept to the juridical plane and that the lawyer did not stray into the politician's, or at any rate the non-lawyer's, arena. In this article he describes and discusses the 'three main schools of thought on the subject, which could conveniently be called the "intentions of the parties" or "founding fathers" school; the "textual" or "ordinary meaning of the words" school; and the "teleological" or "aims and objects" school'. He points out that these are not necessarily exclusive of each other, though in fact each gives primacy to one particular aspect of treaty interpretation, 'if not to the exclusion, certainly to the subordination of the others'; and that the teleological school 'has its sphere of operation almost entirely in the field of general multilateral conventions, particularly those of the social, humanitarian, and law-making type'. He does in a note warn that:

The teleological method, finally, is always in danger of 'spilling over' into judicial legislation: it may amount, not to interpreting, but, in effect, to amending an instrument in order to make it conform better with what the judge regards as its true purposes.

He also points out the difficulty and the artificiality in many cases of trying to ascertain the actual intentions of the parties; all of which must have been very present to the mind of one who had himself already considerable experience of the negotiation of conventions. Having thus described the current controversy about treaty interpretation, Fitzmaurice then proceeds, as was his habit, to attempt a reconciliation of the different points of view: not indeed because he was by nature a conciliator—on the contrary, as already mentioned, he was extremely suspicious of lawyer-conciliators—but because he felt that there was added strength to be found for the law when principle was found to be consistent. Accordingly, having established that the jurisprudence of the Court shows a division of view means, where the means, considered as a legal means, are of such a character as to be inadmissible.'

Mention may also be made here of the late article, in the *Festschrift für Hermann Mosler (Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte* (1983)), entitled 'Some Reflections on the European Convention on Human Rights', in which he complains about the way the Strasbourg Court has tended, in its interpretation of the Convention, to 'intermix two conceptually quite distinct categories of acts, both treated as offences against Human Rights, and that deals with them as being all on the same plane—thereby degrading what are truly matters of human rights in the proper historical sense of the term to the level of what are more matters of socio-economics, while exalting the latter to a stratum of ideas that is not intrinsically theirs' (pp. 203-4).

But Fitzmaurice admits that 'Because of the way in which the European Convention on Human Rights is drafted, it lends itself to this method of interpretation'.

<sup>72</sup> See this *Year Book*, 28 (1951), pp. 1-25; also *ibid.* 33 (1957), pp. 203 ff.

between two principal doctrines, the majority favouring the textual method, 'while some individual Judges are teleologists', he goes on:

(b) *Reconciliation of these doctrines*. The differences of view involved may be less wide than they appear, and in practice need not even be as wide as they are. The teleological principle, expressed in a more restrained form, is really an application of the well-known and valuable rule of treaty interpretation which the Court itself has recognized—the rule *ut res magis valeat quam pereat*, or principle of maximum effectiveness—the rule that, other things being equal, so to speak, texts are to be presumed to have been intended to have a definite force and effect, and should be interpreted so as to have such force and effect rather than so as not to have it, and so as to have the *fullest* value and effect consistent with their wording (so long as the meaning be not strained) and with the other parts of the text. Regarded in this way, the teleological principle has a useful role to play without going beyond the bounds of legitimate interpretation, or involving the Court in an essentially legislative activity, which would be inadmissible. The Court, as will be seen, has in fact adopted the principle of effectiveness, subject to limitations, which ensure that the language of the instrument is not strained and the interpretative function not exceeded.<sup>73</sup>

In short, although insisting on a primarily textual interpretation process, Fitzmaurice was quite happy to accept, where useful, a disciplined teleological approach to the proper interpretation of the text, always provided that the process stays within what can reasonably be called interpretation and does not succumb to the temptation to stray into legislation.<sup>74</sup>

<sup>73</sup> See this *Year Book*, 28 (1951), p. 8.

<sup>74</sup> It may be useful in this note to reproduce Fitzmaurice's clear and economical summary—what he calls 'a bare summary'—of 'the main general rules of interpretation laid down by the Court', if only because he so skilfully succeeds in his professed aim to formulate, though always keeping within the findings of the Court, a self-consistent body of principles governing the subject:

(A) *Major principles of interpretation*

I. *Principle of Actuality*. Treaties are to be interpreted primarily as they stand, and on the basis of their actual texts.

II. *Principle of the Natural Meaning*. Particular words and phrases are to be given their normal, natural, and unstrained meaning, in the context in which they occur.

*Subject to I and II:*

III. *Principle of Integration*. Treaties are to be interpreted as a whole, and with reference to their declared or apparent objects, purposes, and principles.

IV. *Principle of Effectiveness*. Particular provisions are to be interpreted so as to give them the fullest weight and effect consistent with the normal meaning of the words and with other parts of the text.

V. *Principle of Subsequent Practice*. In interpreting a text, recourse to the subsequent practice of the parties, as evidenced in rules of procedure they have formulated, or in other ways, is not only permissible but desirable; in brief, the way in which the treaty has actually been interpreted in practice is evidence (sometimes the best evidence) of what its correct interpretation is.

(B) *Subsidiary interpretative findings*

...

I. Positive and active obligations—as also definite exceptions to, or derogations from, such obligations—cannot be left to arise as a mere inference from a text or provision. They must be expressed in terms. In other words, positive obligations, or exceptions thereto, cannot be *read into* a

## VI. THE FORMAL SOURCES OF INTERNATIONAL LAW

An essential key to a comprehension of Fitzmaurice's views on the proper ways to set about interpreting and applying an international legal instrument—views central to his whole philosophy of the nature and future of public international law—is his distinctly unorthodox opinion on the nature of the formal sources of public international law, and particularly of the juridical nature of treaties. This must, therefore, now be considered. It is to be found in one of Fitzmaurice's shorter essays (only 24 pp.), which appeared in *Symbolae Verzijl* in 1958, under the title of 'Some Problems Regarding the Formal Sources of International Law'.<sup>75</sup> The formal sources (i.e. the 'acts or facts' by which a rule gets its 'obligatory character as law', as contrasted with the 'material' sources from which the content of the rule may be derived) are not only a topic of constant, major importance, but one which, because of its being above all a question of the basic principles of international law, was bound to fascinate Fitzmaurice.<sup>76</sup> This article was characteristic of the Fitzmaurice hard-thinking analytical approach, not in the least afraid if it led him to re-examine the precepts of conventional wisdom.

After carefully defining the use of terms, the purpose of the paper is stated at the outset: '. . . its principal object is to question three very commonly received views as to the character of the formal sources of international law, namely first, that treaties are formal sources of law; secondly, that natural law is not a formal source of law but only a material source; and thirdly that the decisions of international tribunals are nothing more than material sources of law.' He then adds the supplementary purpose inextricably bound up with the question about treaties:

A further point which the paper will seek to bring out is the distinction between the source of law and the source of obligation, failure to recognise which has often led to confusion. Two distinct concepts are here involved. They may of course

treaty. If not actually expressed, they must at least be a *necessary* (and not merely a *possible*) inference from what *is* expressed.

2. A Court cannot remedy a breach of treaty, by reading into the treaty a sanction or remedy for which it does not provide. This does not affect the responsibility of the defaulting State, but the remedy will consist in the application of the ordinary rules of State responsibility, liability to pay damages or compensation, &c. The Court cannot interpose to apply or sanction a special remedy not expressly contemplated by the treaty, or different from the method it does contemplate.

3. Powers or functions provided in a treaty for the purpose of assisting the parties *mutually* cannot be applied or utilized for the benefit of one or some of them only, and against the other or others, even if it is the default of the latter that has led to these powers or functions being invoked.

4. The preamble to a treaty (which does not and should not have direct operative force) has effect as indicating the general purposes and spirit of the treaty, in the light of which the interpretation to be given to particular provisions may be considered.

5. *Expressio unius est exclusio alterius*.

(*Ibid.*, p. 9; some intervening explanatory text and two notes are omitted from the above citation.)

<sup>75</sup> *Symbolae Verzijl* (1958), pp. 153-76.

<sup>76</sup> He told the present writer on more than one occasion that he himself considered this article one of the best things he had done; and that he regretted that it was not as well known as some of his other work.

coincide—for instance, the same instrument may be both a source of law and a source of obligation, as in the case of an act of the legislature. But equally, an instrument may be a source of obligation only, and not a source of law, as, for instance, in the case of an ordinary contract.<sup>77</sup>

On the first question, whether treaties are a formal source of law, Fitzmaurice's thesis was that 'considered in themselves, and particularly in their inception, treaties are, formally, a source of obligation rather than a source of law'.<sup>78</sup> Their obligatory character arose because of the antecedent general principle of law that *pacta sunt servanda*. 'A statute is always, *from its inception*, law: a treaty may reflect, or lead to, law, but, *particularly* in its inception, is not, as such "law"'. So called treaty law is really pseudo-law—a *droit fainéant*.'

All this is true, according to Fitzmaurice's analysis, even in the case of a codifying treaty.

. . . If the treaty reflects (codifies) existing law, then, in applying it, the parties merely conform to general law obligations already valid for them. The treaty may state what these obligations are, or define the scope of them, but it does not thereby alter their character as rules of general law to which the parties would be obliged to conform even in the absence of the treaty. In so far as it might purport to do so, it would cease merely to codify, and would create—not (for reasons already given) new law, but merely new particular obligations between, or *vis-à-vis*, particular parties.<sup>79</sup> In the case of any provisions of a codificatory character, it is clear that the treaty (even for the parties) declares but does not create the law. It may (as between the parties) create a new *basis* of *obligation* to conform to the law, but does not on that account become the formal source of the law, even between the parties—just as, if, in the domestic field, one man were to enter into a contract with another, or subscribe to an undertaking to accord that other certain rights that were in any case due to him under the general law of the country, the contract or undertaking would still not constitute the source of the law thus implemented, though it might be the source of an additional or reinforced obligation to obey it.

This insistence, in effect, on the definitive importance of the element of formal agreement in treaties is today not without difficulty; it was written some fifteen years before the Third United Nations Conference on the Law of the Sea began to experiment—though with what ultimate success remains still to be seen—with new treaty-making processes that were, to say the least, an attempted gloss on the traditional, essentially contractual procedures. Some indication of Fitzmaurice's later thoughts about treaties may be gleaned from his Institut centenary monograph noted above; though this again was penned long before the Law of the Sea

<sup>77</sup> *Symbolae Verzijl* (1958), p. 154; this thought echoes that employed in the discussion on the place of consent and agreement, to be found in the Hague 1957 lecture; see above at p. 7.

<sup>78</sup> *Ibid.*, p. 157.

<sup>79</sup> Fitzmaurice's note at this point reads: 'These may eventually lead to the emergence of law (see below) and of course many "law-making" treaties have a double aspect—the declaratory or codificatory, and the development or progressive.'

Conference even got under way;<sup>80</sup> but it does not in any way suggest the feeling of any need to revise the view put forward in the earlier article, and the strict view had been endorsed in 1969, specifically in relation to human rights.<sup>81</sup>

Yet it is very difficult even now to deny the force of Fitzmaurice's argument that treaty *as such*, and particularly at its inception, is a source of obligation rather than a source of law. Indeed, treaty as a source of quite *particular* obligations is so important a tool of international relations that, even if treaty could be transformed into some kind of general legislative process, it would then be necessary in some way to reinvent the classical treaty. It may well be that certain forms of multilateral treaty might in ways yet to be defined become a part of some new law-making processes that are nearer to some kind of quasi-legislation: namely, making the obligations contained therein in some degree general and not particular. But that end, desirable as it might be thought to be, will not be brought nearer by a failure to face up to the problems that inexorably arise from the inherent qualifications of the treaty as such and its normal character and function as an international instrument; or, for that matter, by the use of suggestive but strictly inapposite phrases in respect of treaties, such as 'international legislation'; or even the use of 'legislative history' instead of 'preparatory work'.

Turning now to the second purpose of this article in *Symbolae Verzijl*, this was, it will be remembered, to question the usual assumption that natural law is not a formal source of law, but, at best, only a material source. Given Fitzmaurice's convinced rejection of positivism, at least in its voluntarist form, it is perhaps not altogether surprising to find him, within carefully defined limits, a naturalist. He was of course certainly also aware, as he makes quite clear,<sup>82</sup> that it would be inelegant, to say the least, if, having demoted treaty to being a mere source of obligation, custom were left as it were in sole possession, as the one true source of international law. But he has no intention of leaving matters there, for he proposes to add to the list no less than two other formal sources of law—namely, *jus naturae* and the decisions of international tribunals.

Thus is revealed a crucial element of Fitzmaurice's legal philosophy: the rejection of positivism and the acceptance of a natural law; a belief that is perfectly consonant with his persuasion that law arises from social necessity.<sup>83</sup> Thus for him, not only was there certainly a law of nature, but this was not a mere source of *content* of the law, that is to say a material

<sup>80</sup> See the section on (A) *International Law Making*, pp. 262–75.

<sup>81</sup> See 'The Older Generation of International Lawyer and the Question of Human Rights', *Revista Española de Derecho Internacional*, 21 (1968), pp. 471–82, where he says: 'These views . . . may seem somewhat bizarre, yet the element of truth they contain provides a necessary correction against prevalent exaggerated ideas of what treaties are and can do. The mainspring of such ideas is the wish to find in the international field an equivalent for legislation. But treaties are not an equivalent of legislation—they are a substitute for it that falls short of equivalence: they are not actually legislation.'

<sup>82</sup> Loc. cit. above (p. 28 n. 77), p. 162.

<sup>83</sup> See *ibid.*, p. 162.

source, that men might draw on for inspiration; for him it had the full stature of a formal source. He admits to the difficulties arising from the uncertain character of the content of the *jus naturae* itself;<sup>84</sup> but he insists that there are nevertheless *some* rules of the *jus naturae* of a fundamental character, which are perfectly clear: such as, for instance, the rules of natural justice which are applied by courts generally. In this present article he also instances the rule *pacta sunt servanda*; and the rule that a State or government cannot plead the provisions or deficiencies of its own internal laws or constitution as a ground or excuse for non-compliance with its international obligations. These are rules, as he says, having an 'inherent necessity' and cannot be satisfactorily derived from a supposed 'consent'. It is, of course, easy to see that it is the idea of 'inherent necessity'—something discoverable by reason—that attracted Fitzmaurice to this solution.<sup>85</sup>

Fitzmaurice's third proposition in this essay that judicial decisions are now, whatever they may once have been, a formal source of law, or at least no longer a mere material source, is easily established not so much from theory as from observation of what now happens in practice. He takes the *Anglo-Norwegian Fisheries* case as an example. In theory it might be said (indeed some attempt was made to say it at the time of the judgment) that it did no more than to obligate the United Kingdom to accept the particular Norwegian straight baselines that were the subject-matter of the litigation. Nevertheless, 'In practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general *principle* of straight base-lines, at any rate in any legal proceedings, even (in all probability) before a tribunal other than the International Court.'<sup>86</sup> Of course it is not every decision of every tribunal that will have this effect; but that the decisions of the highest tribunals and of the International Court in particular do amount to formal sources of law seems now undeniable; though Fitzmaurice, writing in 1958, put it with deliberate caution:

... it is suggested that the decisions of international tribunals, while no doubt of varying weight and authority, cannot be regarded simply as no more than one among various material sources of law . . . Alternatively decisions might, *qua* material sources, be characterized as 'formally material'—i.e. as sources which tribunals are bound to take into account, even if they are not bound to follow them; so that, if the tribunal concerned does not follow a given decision, it must at least be in a position to distinguish or refute it on specific grounds.<sup>87</sup>

<sup>84</sup> See loc. cit. above (p. 28 n. 77), note on p. 162.

<sup>85</sup> In the later paper (1969) mentioned in note 81 on p. 29 he makes it clear that for him the *jus naturae* is not a matter of revelation but 'the product of the mind of man, using for that purpose the faculties he has been invested with' (loc. cit., p. 473).

<sup>86</sup> Loc. cit. above (p. 28 n. 77), p. 170. This may seem an obvious conclusion today; but it is worth remembering that this was a somewhat daring statement for a governmental legal adviser—and of the losing government moreover—to have made at so short an interval after the judgment.

<sup>87</sup> Ibid., pp. 172–3.

The scheme of things resulting from the three somewhat radical propositions of this essay obviously gives rise to difficulties over Article 38 of the Statute of the International Court of Justice, commonly regarded as listing the formal sources of international law. This difficulty Fitzmaurice deals with first by pointing out that Article 38 does not in fact mention sources of law at all; it is not a list of sources so much as

simply a sort of standing directive to the Court as to what it is to apply in deciding cases brought before it—much as, in a *compromis*, the parties might refer a matter for decision by a tribunal on the basis of certain specified principles or elements, or categories of either.<sup>88</sup>

As to the *jus naturae* and Article 38, he sees it as coming within section 1(c) of that Article; for

The view that the term ‘the general principles of law recognized by civilized nations’ does not *at least* include and cover (even if it is not identical with) the principles of natural law, is very difficult to accept. Indeed, it would be hard to give any precise meaning to this phrase if that view were correct. How many civilized nations, for instance? And suppose some of the most civilized happen not to recognize a particular principle? What sort of enquiry must be made?—etc.<sup>89</sup>

How does this distinctly unorthodox essay, a favourite of Fitzmaurice himself, stand after some twenty-five years? The answer must be that it stands quite remarkably well. Although there may now be a doubt whether a strictly contractual analysis can be applied without qualification to all multilateral so-called law-making treaties, yet Fitzmaurice does allow treaties great influence in the development of custom. It is anyhow certain that most treaties are *not* law-making in a general sense—indeed the very essence of a treaty is that it has identifiable parties who alone, with limited and recognized exceptions, are obligated—and it is not easy to deny that such treaties are sources of obligation rather than of law. The contrary view seems to be based largely on an interpretation of Article 38 of the Court’s Statute which is neither necessary nor even called for by the ordinary meaning of the text of the article.

The other two principal propositions of the article also stand very well. It is good that the recognition of the position nowadays—though surely not when Article 38 was originally drafted—of judicial decisions as sources of law should have been lent the great authority of Fitzmaurice. And the suggestion concerning the general principles of law, though expressed with caution and qualification, gave promise of giving a reasonably certain content for them as something the Court is required to

<sup>88</sup> Ibid., p. 173.

<sup>89</sup> This quotation, however, is not from the article on sources in the *Symbolae Verzijl*, but is note 1 on p. 56 of his Hague General Course. It may well be that, despite their respective dates of publication (1958 and 1957 respectively) the article for *Symbolae Verzijl* was written first; or at least the General Course was finalized last. See also note 2 on p. 36 of the General Course, in which he refers to the *Symbolae Verzijl* article.

apply. There may be more than one view of what is the *jus naturae*. But these quite particular and *necessary* general principles which Fitzmaurice meant by the law of nature must indeed be applied by the Court. This does at least yield a more certain answer than the notion that the 'general principles of law' are to be distilled from a concoction, that may vary somewhat according to taste, to be prepared and served by comparative lawyers. That idea, though it is possible to write articles and even books about it, has never loomed very large as a principal means of decision in international tribunals. It was certainly regarded with grave suspicion by Fitzmaurice.

\* \* \*

Some consequences of Fitzmaurice's view of treaties as sources of obligation rather than law are to be found in a relatively little known article about 'The Older Generation of International Lawyer and the Question of Human Rights'.<sup>90</sup> Here he is questioning the efficacy of the United Nations Human Rights Conventions in so far as they are sometimes supposed to promulgate universal law. The reason for Fitzmaurice's concern is of course because, for him, there is an obvious juridical flaw in the proposition that these treaties can be said to create universal obligations. This is why

... the international lawyer of an older school feels a certain unease when he finds himself in the presence of precepts, injunctions, or prohibitions, compliance with which, or observance of which, is claimed to be a matter of universal obligation, but the *legal* force of which depends, or appears to depend, exclusively on conventional rules embodied in various treaty instruments—especially if those instruments have not, as such (that is to say *qua* treaties), received any widespread measure of acceptance, even if there may be a general recognition of at least a moral obligation to conform to the rules they contain. Instinctively he looks for something more. Are the treaties or conventions really all?—for if they are, then States that have not become parties to them are free of all *legal* obligation in the matter.<sup>91</sup>

In thus exposing the juridical difficulties Fitzmaurice did, as he very well knew, run the risk of being misunderstood, or even of being misrepresented as being less than enthusiastic about the importance of human rights. But this is belied by the latter part of the same article where we find him examining in what way human rights *could* be made part of customary law; that is to say, truly of universal *legal* obligation. To this end he is prepared to use the notion of abuse of rights; and he is also entirely prepared to try to extend the notion of *sic utere tuo ut alienum non laedas*. Certainly, he concedes, a State's treatment of its own subjects could not have been said to harm other States. But have modern conditions brought about a change?

<sup>90</sup> *Revista Española de Derecho Internacional*, 21 (1968), pp. 471–82.

<sup>91</sup> *Ibid.*, p. 476.

Even without postulating any juridical principle of the inter-dependence of States, giving rise to legal consequences, such as that on which an eminent scion of Spanish civilization and thought, the late Judge Alvarez, a member of the International Court of Justice, based much of his judicial reasoning, there are certainly grounds upon which it may be contended that any serious denial by a State of basic human rights to its nationals, or a particular category of them, not only has, in these days, repercussions, by giving rise to international friction, but can do harm to other States by causing unrest and even outbreaks of violence in their territories. This can also be a fruitful source of the tensions that lead to wars and that have demonstrably done so, not least in recent times. As Judge De Visscher has said, without respect for human rights, the executive develops 'at home into tyranny and abroad into a machine of destruction'. How well do those of this century know it!<sup>92</sup>

This is hardly the statement of an international lawyer stuck in his ways! Indeed, it might be contended that his proposals for the extension of customary law to include universally protected human rights are more radical than the proposition that such treaties may carry universal obligations. Fitzmaurice would not care whether his suggestions were dubbed radical or conservative. What mattered to him was (a) whether they were genuinely juridical arguments and (b) whether they would stand up to juridical reason and scrutiny. Now the extension of custom into the human rights field, however bold it may be—and it undoubtedly is—is a *juridically* sound way of creating universal *legal* obligation; the treaty way, on the other hand, is obviously open to effective attack from a State not a party. It was not possible for Fitzmaurice to ignore a manifest juridical flaw or weakness; not only because to do so might jeopardize the protection of human rights in practice (as opposed to paper victories) but also because he was so conscious that to take the juridical short cut may be to harm the system of international law as a whole.<sup>93</sup>

How he translated this approach into his work as a judge can now be examined under a rubric of his own.

## VII. JUDICIAL INNOVATION—ITS USES AND ITS PERILS

The more one studies the work of Fitzmaurice as a whole, the more is one struck by its consistency. This is also true of his work as a judge, even though intellectual consistency can never be easy for a judge because

<sup>92</sup> The source for this quotation from De Visscher, as given by Fitzmaurice, is its citation by Beckett in *Transactions of the Grotius Society*, 34 (1948), pp. 69–72 at p. 70. The source is there stated to be a paper read by Judge De Visscher to the Institute of International Law 'last August', i.e. August 1947.

<sup>93</sup> Perhaps it is as well to recollect, in order to avoid any misunderstanding, that Fitzmaurice, as appears from every passage in which he deals with the juridical nature of treaties, was entirely aware of the possibility that the provisions of multilateral conventions may become customary law. But to postulate this possibility is to beg the question at issue in the case of human rights conventions; and to come up against the unfortunate circumstance that the actual practice of States in the matter of human rights does not give much promise of supplying the missing ingredient required for the conversion of a treaty provision into new customary law by this particular method.

different cases tend to pull in different directions. As has already been mentioned at the beginning of this article, the opinions of Fitzmaurice as Judge both of the International Court of Justice and of the European Court of Human Rights have been systematically studied in the earlier articles in this *Year Book* of Mr Merrills.<sup>94</sup> Nevertheless, it would not be right altogether to ignore the judicial opinions in this present article, because the writings and the judicial opinions belong very much together. The latter are no less finely constructed and reasoned pieces of scholarship than the former. It seems apt at this point, therefore, to refer very briefly, by way of illustration, to some samples taken from his work as a Judge of the Strasbourg Court of Human Rights. What these instances exhibit most strongly of course—and very many others would have served equally well—is the conviction that a court of law's function and duty is to apply the law as it is, and that it is not the court's role to usurp the functions of the legislator.<sup>95</sup> This conviction inevitably stands in peril of being mistaken, at least by those who have not studied his work with the care it demands, for mere legal conservatism; and to be, in the modish phrase, 'unrealistic'. Now some may well think that there is nothing much wrong anyway with legal conservatism, or at any rate legal caution, in a judge of a tribunal from which there is no appeal. But of course Fitzmaurice was not in fact a legal conservative. He was a visionary, innovator and idealist with some very radical ideas about the law of the future. And this is precisely why he felt so strongly that the judge is required to decide legal questions on intellectually impeccable grounds demonstrably derived from recognized existing law. Nothing less would do to bring about the establishment of the rule of law in international matters. The title of this present section of this article—'judicial innovation—its uses and its perils'—is of course borrowed from the title of one of his own articles dealing with this problem.<sup>96</sup> Again it is necessary to caution against the facile supposition that Fitzmaurice was not able to appreciate that courts do innovate and that innovation is often desirable or even unavoidable. The following passages taken from the introductory paragraphs of that article<sup>97</sup> show that he was

<sup>94</sup> And see also the article in the present volume by Mr Redfern on the arbitration between Aminoil and Kuwait. This was Fitzmaurice's last task as a judge, and as Mr Redfern points out he gave a most interesting separate opinion, much of the reasoning of which, indeed, seemed almost to be pointing in a different direction from the reasoning of the Court.

<sup>95</sup> Note, however, that he does (see the second article on 'Hersch Lauterpacht—The Scholar as Judge', this *Year Book*, 38 (1962), at p. 11) allow a 'Possible legitimate place of the element of international public interest', whilst warning that 'an unrestricted use of the notion could only lead to a course of semi-legislative action on the part of international tribunals'. But he saw the possibility of lending precision in this way: '—namely that if, in any given situation, two outcomes are legally possible, each of them sustainable juridically by an equally (or broadly equally) valid motivation, then it is legitimate and indeed legally right to choose that which is in accordance with the highest international interest (assuming that to be clearly apparent).'

<sup>96</sup> In *Cambridge Essays in International Law: Essays in Honour of Lord McNair* (ed. Jennings, 1965), pp. 24–47. The full title of the article by Fitzmaurice is: 'Judicial Innovation—Its Uses and its Perils—As exemplified in some of the Work of the International Court of Justice during Lord McNair's Period of Office.'

<sup>97</sup> Footnotes to the passages cited have been omitted.

very much alive to all sides of the problem, which anyway is part of the inescapable lot of the judge; and especially perhaps of the international judge. It seems right to cite these passages fully because they express so clearly a carefully balanced view on what must frequently be a difficult course for a court to steer 'between being ultra-conservative and ultra-progressive', as Fitzmaurice himself expresses it.

It is axiomatic that courts of law must not legislate: nor do they overtly purport to do so. Yet it is equally a truism that a constant process of development of the law goes on through the courts, a process which includes a considerable element of innovation. Without it, the common law of England would never have come into being, as the record clearly shows. Nor, for that matter, would the civil law of ancient Rome; for the great codifications came only after a long legal evolution, much of which resulted from the action of the magistrature. Modern experience shows that even in fully developed legal systems this process is necessary, and goes on all the time; for it is beyond the normal capacity of any legislature to provide in advance for all the subtleties, the twists, the turns and the by-ways resulting from novel and constantly changing conditions. Only through the day-to-day action of the courts can these be handled. Nor can the legislature anticipate great issues of principle which may arise suddenly, and indeed for the first time, through the medium of a litigation. In practice, courts hardly ever admit a *non liquet*. As is well known, they adapt existing principles to meet new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precept.

Particularly is this true and necessary in the case of those higher national tribunals with which the International Court of Justice may, *mutatis mutandis*, best be compared, such as the Supreme Court of the United States or the House of Lords in England in the exercise of its appellate jurisdiction through the 'Law Lords'. It is recognised that the type of case which comes before these and similar tribunals will often be of such a kind that a considerable element of legal policy will and, within permissible legal limits, should enter into the process of deciding them, taking account of the climate of opinion of the day, and of prevailing social and economic tendencies.

The International Court is no more immune from such influences than are other comparable tribunals; but nor does it seem more prone to them. At the same time, were it to be, some justification for the fact could be found in the absence of any legislative process in the international field, apart from the uncertain action of the United Nations or through the slow and not entirely satisfactory medium of the so-called general multilateral 'law-making' convention. The evolution of rules of customary international law through the practice of states, while it can sometimes be very swift (consider for instance the case of the continental shelf) is more often slow, and quite often (where practice is conflicting) fitful, erratic and uneven. In these circumstances, international tribunals, and in particular one having the prestige of the International Court, have a special role to play in supplying the elements of innovation necessary to the good health of any legal

system, and in resolving otherwise irresolvable conflicts of state practice by a 'clarification' of the law, which, be it noted, frequently involves in fact, though never in theory, an element of innovation. Sometimes quite a mild innovation which hardly changes the law, or one confined only to a particular aspect of a thing or intended to operate only for the immediate purposes of the case, will pave the way for eventually quite radical changes by starting a new trend of ideas.

It may be objected, and with force, that a necessary ingredient of any sound legal system is that of the 'certainty' of the law—that the parties, in going to law, must be able, not indeed to predict the outcome, but to be reasonably sure as to the legal basis from which that outcome will proceed, and the principles which will be applied in reaching it;—in short the parties must be able to feel that a court of law will not go off at a tangent and decide the case on some wholly new footing thought up by itself and not discussed in the course of the argument. This objection is justified in the sense that although the jurisprudence of the International Court firmly establishes its right to raise points, and decide on the basis of them *proprio motu*, it should at least raise them before deciding them, and this not merely in its private deliberations but at the public hearing, so that the parties may have an adequate opportunity of arguing them.

On the other hand, if it is true that parties will not go to law before a court the legal *basis* of whose decisions is not, within reasonable limits, predictable, it is equally true that, in a period of transition, they will be reluctant to have recourse to a tribunal which they believe to be insensible to the 'winds of change' and, to employ a useful colloquialism, not to be 'with it.' In short, a court situated as the International Court is, must steer a middle course between being over-conservative and ultra-progressive. This it seems to have been reasonably successful in doing (the task is not an easy one). It has to be tolerated that not all innovations are good ones, in the sense of being adequately sustainable as a matter of law; but the paradox is that some innovations may be 'bad' in this sense, and yet 'desirable' on broader grounds—sometimes a sound innovation is based on dubious legal grounds, when better and legally sustainable grounds were available. This is always a pity—yet it should not be allowed to obscure the essential desirability of the innovation, if it seems to be so, provided it does not run contrary to basic legal principle and remains capable of some justification in acceptable legal terms, even if other than those relied on.

Fitzmaurice then goes on to illustrate the problem from the cases before the Hague Court during McNair's time there. And he concludes with an observation about McNair's attitude which is also most apt for Fitzmaurice himself:

If he could not always concur in them [the innovations], this, as all who know him would agree, was not on account of any hostility to innovation as such, but because, in his view, a judicial innovation (indeed *especially* a judicial one), however desirable it might be from other standpoints, is too dearly purchased if it is made at the sacrifice of the integrity of the law.

\* \* \*

One of the most striking illustrations of Sir Gerald's approach is to be found in his separate opinion in the *Golder* case before the Strasbourg

Court of Human Rights.<sup>98</sup> The short point was whether the refusal of British prison authorities to allow Golder, whilst still a prisoner, to write to a solicitor with a view to bringing an action for defamation against a prison officer, was a breach of the European Convention on Human Rights? Fitzmaurice concurred in the unanimous finding of the Court that there had been a breach of Article 8 of the Convention, although giving rather different reasons;<sup>99</sup> but—and this is the part of his opinion which concerns us here—he dissented from the finding of the majority that Golder had been denied access to the courts and that a right of access was to be implied from the words of Article 6, paragraph 1.<sup>100</sup> He disagreed with the Court first on the interpretation of the facts, even supposing that Article 6, paragraph 1, did grant a right of access, but this need not now detain us. What is in point here is Fitzmaurice's strong disagreement with the Court's interpretation of the paragraph, and their reading into it a right of access which is not in fact mentioned at all in the text of the article. As to this he said:<sup>101</sup>

... I believe that the Court has proceeded on the footing of methods of interpretation that I regard as contrary to sound principle, and furthermore has given insufficient weight to certain features of the case that are very difficult to reconcile with the conclusion it reaches.

He then proceeded to a general criticism of the Court's approach to the question of interpretation, first making the important point that there is a crucial difference between legislation and the provisions of a treaty resulting from the agreement of the parties.

32. It is an understandable, reasonable and legitimate point of view that access to the courts of law is, or should be, regarded as an important human right. Yet it is an equally justifiable view to say that the very importance of the right requires (more especially in a convention based on inter-State agreement, not sovereign legislative power) that it should be given explicit expression, not left to be deduced as a matter of inference. This leads up to an essential point. There is a considerable difference between the case of 'law-giver's law' edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed. Far greater interpretational restraint is requisite in the latter case, in which, accordingly, the convention should not be construed as providing for more than it contains, or than is *necessarily* to be inferred from what it contains. The whole balance tilts from (in the case of law-giver's law) the negatively orientated principle of an interpretation that seems reasonable and

<sup>98</sup> Series A, No. 18; 57 ILR 201.

<sup>99</sup> See Merrills, *loc. cit.* above (p. 2 n. 9), p. 135.

<sup>100</sup> Article 6, para. 1, provides:

'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within reasonable time by an independent and impartial tribunal established by law.'

<sup>101</sup> Separate opinion, para. 24.

does not run counter to any definite contra-indication, and an interpretation that needs to have a positive foundation in the convention that alone represents what the parties have agreed to,—a positive foundation either in the actual terms of the convention or in inferences necessarily to be drawn from these;—and the word ‘necessarily’ is the decisive one.

33. That word is significant because the attitude of the Commission to this case and, though more guardedly, that of the Court, seems to me to have amounted to this,—that it is inconceivable, or at least inadmissible, that a convention on human rights should fail in some form or other to provide for a right of access to the courts: therefore it must be presumed to do so if such an inference is at all *possible* from any of its terms. This attitude clearly underlies what is said in the last section of paragraph 35 of the Court’s Judgment, that it would, in the opinion of the Court ‘be inconceivable . . . that Article 6.1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it possible to benefit from such guarantees, that is, access to a court’. As a matter of logical reasoning however, this is a complete *non-sequitur*. It might perhaps seem natural that procedural guarantees of this kind should ‘first’ be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best possible and in no way a necessary one;—for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, *but that where it is afforded* there should be safeguards as to the character of the ensuing proceedings.

34. Generally speaking, at least in this type of provision, an inference or implication can only be regarded as a ‘necessary’ one if the provision cannot operate, or will not function, without it. As has already been indicated (*supra*, paragraph 25), in Article 6.1 the necessary, and the only necessary inferential element lies in the assumption (without which the provision makes no sense but more than which it does not require in order to make sense) that legal proceedings of some kind have been started and are in progress. It is in no way necessary, either to the operation of this text, or to give it significant meaning and scope, that the further and quite gratuitous assumption should be made that the text implies not only the existence of proceedings but an *a priori* right to bring them,—which is to enter upon a distinct order or category of concept, for doing which there is no warrant, since the Article has ample scope without that. To quote my colleague Judge Zekia, it ‘has . . . its *raison d’être* . . . without grafting the right of access onto it’.

Fitzmaurice then, changing key as it were, goes on to deal in terms of practical policy with what he regards as the true *ratio decidendi* of the Court’s decision, that is, the ‘fear of the supposed consequences that might result from any failure to read a right of access into Article 6.1’, because ‘fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings’ (paragraph 35 of the judgment). This reasoning he attacks on several grounds. First, on the ground that the ‘consequences foreshadowed are completely unrealistic or at best highly exaggerated’. Second by a characteristically Fitzmaurice

objection, simply pointing out that the Court's judgment involved logical error; something which for Fitzmaurice must be a conclusive objection:

The argument embodies a well known logical fallacy, in so far as it proceeds on the basis that without right of access the safeguards for a fair trial provided for by Article 6.1 would be rendered nugatory and objectless,—so that the one must necessarily entail the other. This is merely to perpetuate the type of fallacy arising out of what is known to philosophers as the 'King of France' paradox,—the paradox of a sentence which, linguistically, makes sense, but actually is absurd, namely the assertion 'the King of France is bald'. The paradox vanishes however when it is seen that the assertion in no way logically implies that there is a King of France, but merely that, rightly or wrongly, if there is one, he is bald. But *that* there is one must be independently established; and, as is well known, there is in fact no King of France. Similarly, one could provide all the safeguards in the world for the well being of the King of France, did he exist, yet the fact that these would all be rendered nugatory and objectless did he not do so, would in no way establish, or be a compelling ground for saying that he did, or must be assumed to. In the same way, the safeguards for a fair trial provided by Article 6.1 will operate if there is a trial, and if not, not. They in no way entail that there must be one, or that a right of access must be postulated in order to bring one about. The Judgment also abounds in the type of logical fallacy that derives B from A because A does not in terms *exclude* B. But non-exclusion is not *ipso facto* inclusion. The latter still remains to be demonstrated.<sup>102</sup>

And finally, Fitzmaurice attacks the Court's reasons as 'typical of the cry of the judicial legislator all down the ages', which, even if it might sometimes have justification on the national plane, 'has little or none in the domain of the inter-State treaty or convention based on agreement and governed by that essential fact'.

It may or it may not be true that a failure to see the Human Rights Convention as comprising a right of access to the courts would have untoward consequences—just as one can imagine such consequences possibly resulting from various other defects or *lacunae* in this Convention. But this is not the point. The point is that it is for the States upon whose consent the Convention rests, *and from which consent alone it derives its obligatory force*, to close the gap or put the defect right by an amendment,—not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them. Once wide interpretations of the kind now in question are adopted by a court, without the clearest justification for them based solidly on the language of the text or on *necessary* inferences drawn from it, and not, as here, on a questionable interpretation of an enigmatic provision, considerations of consistency will, thereafter, make it difficult to refuse extensive interpretations in other contexts where good sense might dictate differently: freedom of action will have been impaired.<sup>103</sup>

Fitzmaurice's argument was based not only upon that exact reasoning which he demanded of any juridical determination, but also on entirely practical reasons which were essentially reasons of policy. First, that the

<sup>102</sup> Separate opinion, para. 37.

<sup>103</sup> Ibid.

instrument to be interpreted depended for its force not only upon the agreement of governments, but upon their *continuing* support. One could not ask for a clearer practical reason of judicial 'policy' than that. Furthermore, continuing the same line of reasoning, the European Convention was in a very special position because it had been emulated by the San José Inter-American Convention on Human Rights, particularly in regard to enforcement machinery. But this had not yet come into force. Then there were the United Nations Covenants which, however, did not have a similar enforcement machinery. He continued:

Speaking generally, the various conventions and covenants on human rights, but more particularly the European Convention, have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or *domaine réservé*. Most especially, and most strikingly, is this the case as regards what is often known as the 'right of individual petition', whereby private persons or entities are enabled to (in effect) sue their own governments before an international commission or tribunal,—something that, even as recently as thirty years ago, would have been regarded as internationally inconceivable. For these reasons governments have been hesitant to become parties to instruments most of which, apart from the European Convention, have apparently not so far attracted a sufficient number of ratifications to bring them into force. Other governments, that have ratified the European Convention, have hesitated long before accepting the compulsory jurisdiction of the Court of Human Rights set up under it. Similar delays have occurred in subscribing to the right of individual petition which, like the jurisdiction of the Court, has to be separately accepted. This right moreover, may require not only an initial, but a continuing acceptance, since it may be, and in several instances has been given only for a fixed, though renewable period. It is indeed solely by reason of an acceptance of this kind that it has been possible for the present (Golder) case to be brought before the European Commission and Court of Human Rights at all.

These various factors could justify even a somewhat restrictive interpretation of the Convention but, without going as far as that, they must be said, unquestionably, not only to justify, but positively to demand, a cautious and conservative interpretation, particularly as regards any provisions the meaning of which may be uncertain, and where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming.<sup>104</sup>

That of course is the nub of the practical objection to the Court's interpretation. Even if the reasoning by which their conclusion was reached would bear examination as a piece of reasoning, the question would still remain whether it is right, or at least politic, to interpret a treaty regime which depended on their agreement and requires their continuing support, in such a way as to impose obligations they had not meant to assume.

<sup>104</sup> Separate opinion, paras. 38-9.

There is very much more in this long separate opinion, even on this same matter of Article 6.1, and quite apart from his very lucid treatment of Article 8. Obviously it is not possible here to do it full justice. One other point should, however, be mentioned lest it be supposed that Fitzmaurice was beguiled by an over-simple view of the factor of the intention of the parties as qualifying the scope and proper interpretation of the agreement. Of this he has the following to say:

It is hardly possible to establish what really were the intentions of the contracting States under this head; but that of course is all the more reason for not subjecting them to obligations which do not result clearly from the Convention, or at least in a manner free from reasonable doubt. The obligation now under discussion does not have that character. Moreover, speaking from a very long experience as a practitioner in the field of treaty drafting, it is to me quite inconceivable that governments intending to assume an international obligation to afford access to their courts, should have set about doing so in this round-about way,—that is to say should, without stating the right explicitly, have left it to be deduced by a side-wind from a provision (Article 6.1) the immediate and primary purpose of which (whatever its other possible implications might be)—no one who gives an objective reading can doubt—was something basically distinct as a matter of category, namely to secure that legal proceedings were fairly and expeditiously conducted. No competent draftsman would ever have handled such a matter in this way.<sup>105</sup>

To this canon on the limits of legitimate interpretation, set out so clearly in the separate opinion in the *Golder* case, there should be added some pungent remarks on the same subject in Fitzmaurice's separate opinion in the *Belgian Police* case.<sup>106</sup> The remarks again concern the intention of the parties, but this time had been provoked by an argument before the Court that 'the whole notion that it [the Convention] has to be understood in terms of the intention of the parties in 1949/50 . . . is quite unrealistic'. On this 'realism' argument—one that is certainly met with elsewhere also—Fitzmaurice had this to say:

. . . What would be unrealistic would be any other view than that [i.e. that the Convention *does* have to be understood in terms of the intention of the parties in 1949/50], even though what the parties then intended may not be the sole applicable criterion. But to pretend that it is not at least one of the most important of the applicable criteria—that it must even be excluded entirely—this is what would lack realism and reason.<sup>107</sup>

He is equally severe on the additional somewhat extreme suggestion in the argument before the Court that 'one must not be influenced by what governments may have thought they were achieving or were trying to achieve in 1949 and 1950'. Of this Fitzmaurice says:

<sup>105</sup> Ibid., para. 40.

<sup>106</sup> Series A, No. 19; 57 ILR 262.

<sup>107</sup> Separate opinion, para. 7.

Not even to be 'influenced by' is surely to go rather far since it seems to suggest that one should actually ignore or take no serious account of what the governments thought. This is not a tenable view; and with regard to it I believe it is pertinent to remember that the functioning of the European Convention, and of its enforcement and judicial machinery, is watched by non-European Governments who would be even more hesitant to subscribe to the right of individual petition than the European governments were in 1949/50—as is clearly shown by the continuing lack of any move to introduce a similar concept, or machinery, into the Universal Covenants of Human Rights. There is a risk in my opinion that such governments would be seriously deterred from ever doing so if it appeared that one of the consequences was liable to be that the limitations which they intended as to the scope of the relevant covenant or convention may not be respected by the organs of enforcement.<sup>108</sup>

Fitzmaurice then goes on to deal with two, and perhaps rather more cogent, arguments that had been put to the Court. The first was that Article 31 of the Vienna Convention on the Law of Treaties (the interpretation article) did not mention the intention of the parties, but rather the object and purpose of the treaty. But, said Fitzmaurice, the objects and purposes of a treaty are not something existing *in abstracto*; they followed from and were closely bound up with the intentions of the parties as expressed in the text of the treaty, or as properly to be inferred from it. Moreover, the Vienna Convention did recognize the importance of the text of a treaty, in which the intentions of the parties are supposed to be expressed. Thus, the Vienna Convention implicitly recognized the element of intentions though not in terms mentioning it.

The other argument put to the Court had been the familiar one that the European Convention on Human Rights was in the nature of a constitutional instrument and that the rules for the interpretation of a constitutional instrument were different. Fitzmaurice's reply to this important argument had better be cited in full:

I have no quarrel with the view that the European Convention—like virtually all so-called 'law-making' treaties—has a constitutional aspect, although the considerations summarised in paragraph 6 above [which refers to those practical considerations, set out in the *Golder* case, that the procedure depends upon the continued acceptance by governments] indicated that, even regarded as a constitution, the Convention should be given a conservative rather than an extensive interpretation. But what I find it impossible to accept is the implied suggestion that because the Convention has a constitutional aspect, the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties.<sup>109</sup>

Finally, in Fitzmaurice's *Belgian Police* case opinion, in so far as it is concerned with the general principles of interpretation, it is right to cite his observation on the terminating remark of a speaker before the Court: 'I conclude by saying that law is always the instrument of policy.' This was not of course a remark well calculated to win the sympathy of Fitzmaurice!

<sup>108</sup> Separate opinion, para. 8.

<sup>109</sup> *Ibid.*, para. 9.

But he was content to say—and it epitomizes his attitude not only to interpretation but to the function and duties of international courts generally:

... such a conclusion is dangerous unless carefully qualified,—for if taken literally and generally, it would seem to justify the excesses of courts of law in the carrying out of the policies of some of the worst tyrannies in history. In my view the integrity of the law requires that the courts should apply it neither as the instrument, nor as the contriver, of policy, but in accordance with their own professional standards and canons.<sup>110</sup>

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This matter of the kind of innovation that is permissible—perhaps kind rather than degree—was also taken up by Fitzmaurice in *Ireland v. United Kingdom*<sup>111</sup> on which the Strasbourg Court gave a judgment in 1978 in which it said, *inter alia*, and in relation to a matter on which Fitzmaurice agreed with the conclusion of the Court, though not for the same reasons, that the function of the Court was:

not only to decide those cases brought before [it] but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by States of the engagements undertaken by them as Contracting Parties. (Paragraph 154)

And on this basis it decided that, under Article 19 of the Convention, it had power to pass also upon the allegations that had been uncontested by the United Kingdom Government. Fitzmaurice concurred that it should do so, but was concerned to find, as he did, a reason other than the basing of this faculty on the purely adjectival provisions of Article 19.<sup>112</sup> This, affirmed Fitzmaurice, placed upon the article ‘a weight greater than its language warrants’. As to paragraph 154 of the judgment, he said:

... there is certainly no provision which invests the Court with any power to ‘develop’ them,—(I am not of course speaking of that natural development that always occurs as an inevitable corollary of the legitimate interpretative process properly belonging to the judicial function, but which is quite different from development as a conscious aim, this being, in my view, a quasi-legislative operation exceeding the normal judicial function).

I can only conclude therefore, that in paragraph 154 of the Judgment the Court is acting out the consequences of a doctrine which it has itself propounded and

<sup>110</sup> Ibid., para. 10.

<sup>111</sup> Series A, No. 25; 58 ILR 188.

<sup>112</sup> Article 19: ‘To ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up:

‘(1) A European Commission of Human Rights hereinafter referred to as “the Commission”;

‘(2) A European Court of Human Rights, hereinafter referred to as “the Court”.’

decided to abide by, but which is neither propounded nor imposed upon it by the Convention as such. The Court could, without any misapplication of the Convention, have formulated a different, much less broad, doctrine. Whether this would have been preferable or not, it is clear that paragraph 154 of the Judgment reflects a subjective attitude of the Court, not an objective requirement of the Convention; and in consequence the more concrete reasons of a procedural character formulated in my paragraph 5 above seem to me to be more persuasive and less open to question than those on which the Court has based the conclusion stated in Point 1 of the Dispositif,—a conclusion with which, purely as such, I am nevertheless in agreement.<sup>113</sup>

There is another important aspect of Fitzmaurice's approach to the task of a judge which is very much at one with his opinion on the task of international lawyers generally. His conviction that decisions, whether innovatory or not, must be based in sound juridical reasoning, and that a weaker juridical argument should never be allowed to prevail over a stronger juridical argument because of considerations of policy, also carries logically with it another aspect of his 'professional standards'. Logically this also entails that all possibly relevant and important juristic arguments should be considered by a court, and thoroughly examined before being put on one side, or applied, as the case might be. Fitzmaurice could not abide an elliptical avoidance of difficult relevant questions: always tempting to a court, and especially one which has to work through drafting committees.

This could be illustrated from almost any of Fitzmaurice's separate, or dissenting, opinions; but two, from different courts, must suffice. Probably the most noticed instance is in his separate opinion in *Barcelona Traction*,<sup>114</sup> where he makes it very clear that the rule in the *Nottebohm* case, which 'obviously could affect the whole outcome of this part of the case', should have been more thoroughly considered by the Court, and 'should not have been side-tracked on the basis that neither of the Parties contested the existence of a Canadian right of intervention and claim'. Not that he thought the Court should have examined this issue without the parties:

In my view they should have been asked, in the exercise of the Court's power to act *proprio motu*, to present full argument on the matter; and the intervention of the Canadian Government under Article 62 of the Court's Statute should have been sought, in order that its views might be made known. If for various reasons, it would not have been practicable to do this during the normal course of the oral hearing, I consider that the Parties should have been recalled later for the purpose, after such interval as might have been thought appropriate for any necessary written exchanges on the subject. . . .

Another brief illustrative example might be from the separate opinion, as Judge of the European Court of Human Rights, in *Ireland v. United*

<sup>113</sup> Separate opinion, paras. 6-7.

<sup>114</sup> *ICJ Reports*, 1970, para. 28 at p. 80.

*Kingdom* in 1978.<sup>115</sup> The Court had found that, owing to the 'existence of a practice' (of treatment of detainees), the normal domestic remedies rules did not apply, and it did not matter that none of the complainants was shown to have exhausted the domestic remedies available in Northern Ireland or elsewhere in the United Kingdom. This decision was of course crucial to the admission of the case. Fitzmaurice felt able to vote with the majority because the admissibility of the case had not been contested by the United Kingdom. He felt impelled, nevertheless, at least to advert to the difficulties which clearly arise in respect of this seeming possible exception to the local remedies rule. As he said: 'I am nevertheless left with the feeling that the whole topic needs more extensive investigation.'

### VIII. PARTICULAR QUESTIONS OF SUBSTANTIVE OR PROCEDURAL LAW

Thus far in the present appreciation of Fitzmaurice's work, one has been concerned with his studies bearing directly on the general structure of international law, the elements of the system as a whole, its formal sources, the future of the subject, and the like. But there were two complementary casts of his mind, both of which came out in all his writing, but sometimes the one predominated and sometimes the other. On the one hand, he was a philosophical jurist, much concerned with the function of law in society, and in this respect, though no dreamer, he was an idealist. On the other hand, he had a very great liking for, and special skill in handling, technicalities of quite particular legal problems; a liking fed by his fascination for puzzles of all kinds, not least the mathematical. Though a consummate technician, however, Fitzmaurice was always first a jurist; and in virtually any of his detailed expositions of technicalities, one finds that it is related to general principle and to its proper place in the system as a whole. But his skill as technician has full scope in two major undertakings that between them provide in effect most of the parts of a large general treatise on both substantive and procedural international law: namely, the series of articles on the jurisprudence of the International Court of Justice, and the work on treaties done as Special Rapporteur of the International Law Commission.<sup>116</sup> So these must now be considered in that order.

<sup>115</sup> Series A, No. 25; 58 ILR 188.

<sup>116</sup> It would be wrong, however, to give the impression that these two major works are the only ones where important examinations of substantive or procedural rules are to be found. To take only one other example, itself a considerable undertaking, the 1948 lectures on 'The Juridical Clauses of the Peace Treaties' (*Recueil des cours*, 73 (1948-II), pp. 255-367); these might seem from the title only to be for those with a remaining interest in Peace Treaties after the Second World War with Italy, Roumania, Bulgaria, Hungary and Finland. But this would be a quite wrong assumption. The relevant clauses lead Fitzmaurice into discussions of general interest on such matters as: the juridical character of treaties of peace; responsibility of a government for the acts of a predecessor; how far does a state of war with a country automatically involve its allies?; how far are resistance movements entitled to be treated as lawful belligerent entities?; *uti possidetis*; cessions and other transfers of territory; nationality of inhabitants of ceded territory; human rights; war criminals, traitors and collaborators; effect of war on treaties; repatriation; restoration of property; UN property; effect of war on private debts—on

(a) *The Articles on the Jurisprudence of the International Court*

Fitzmaurice began his celebrated series on 'The Law and Procedure of the International Court of Justice' in the 1950 volume of this *Year Book*; and it was to continue, with one brief interval, and to get longer and more elaborate, until he was himself elected a member of the Court. The series was, as Fitzmaurice explains in a note,<sup>117</sup> inspired by Beckett's work on the decisions of the Permanent Court of International Justice.<sup>118</sup> Beckett's idea was this: that much of the work of the Court had concerned matters such as obscure treaties or contracts of no great general interest, with the result that many people had failed to realize 'how many points of general application have already arisen incidentally in the cases submitted to the Court, or how many rulings by the Court on questions of general international law and procedure are to be found embedded in these necessarily long and complicated judgments'.<sup>119</sup> Fitzmaurice set out to do a like service for the International Court of Justice, following at first a plan similar to that which had been used by Beckett. Hence, his three main headings were: the substantive law; the interpretation of treaties; and the law and procedure of international organizations and tribunals.<sup>120</sup>

private contracts; ratification of treaties; legal character of an annex to a treaty. And then one never knows when in the work of Fitzmaurice one will find a gem of a short, masterly summary of a legal question, often in the form of a note but really an *excursus*. For instance, at page 24 of this work there is a little essay on the juridical effect of preambles to treaties. Mention should also be made of some of the earliest articles, 'The Meaning of the Term "Denial of Justice"' in this *Year Book*, 13 (1932), p. 93; 'State Immunity from Proceedings in Foreign Courts', *ibid.* 14 (1933), p. 101; 'Do Treaties Need Ratification?', *ibid.* 15 (1934), p. 113; 'The Case of the "I'm Alone"', *ibid.* 17 (1936), p. 82. These are all about law that has changed much since that time; but the articles are still essential reading for an understanding of the basic problems involved.

<sup>117</sup> See 'The Law and Procedure of the International Court of Justice; General Principles and Substantive Law', this *Year Book*, 27 (1950), at p. 2 n. 2.

<sup>118</sup> See 'Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application', this *Year Book*, 11 (1930), pp. 1-54.

<sup>119</sup> *Ibid.*, p. 1.

<sup>120</sup> This list of main headings was later elaborated slightly and became: I. General Principles and Sources of International Law; II. Points of Substantive International Law; III. Treaty Interpretation and Other Treaty Points; IV. International Organizations and Tribunals (including Jurisdiction, Competence and Procedure). Although the main headings remained much the same, the number of articles involved in each cycle varied, not only as a consequence of the number of cases and points involved, but also according to the amount of comment, which tended to become more and more ambitious as the series progressed. The first cycle consisted of three articles in volumes 27, 28 and 29, and covered cases from the beginning of the International Court of Justice up to 31 March 1951, namely *Corfu Channel*; *Asylum* (earlier phases); the *Injuries* case; the first and second *Admissions* cases; the first *South West Africa* case; and the *Peace Treaties* case. The second cycle, however, extended over five articles in volumes 30 to 34 (1953-8) and covered cases from 31 March 1951 to 31 March 1954; namely *Reservations to the Genocide Convention*; *Haya de la Torre*; *Norwegian Fisheries*; *Anglo-Iranian Oil*; *United States Interests in Morocco*; *Ambatielos*; *Minquiers and Ecrehos*; and *Nottebohm* (jurisdictional phase). The third cycle was planned to be the cases from 1954 to 1957, namely *Monetary Gold*; *Nottebohm* (Merits); *UN Administrative Tribunal*; *South West Africa (Voting Procedure)*; *South West Africa (Petitioners)*; and the various *Aerial Incident* and *Antarctica* cases. In the event, only one of these third-cycle articles was completed before Sir Gerald himself was elected to the Court and his own series came to an end. That one article is in volume 35 (1959) and deals only with the first heading, 'General Principles and Sources of International Law'. It appears (this *Year Book*, 34 (1958), at p. 1) that it had been intended to publish the first two cycles in book form, with later cycles as added volumes (see also this *Year Book*, 33 (1957), p. 203 n. 1). It is a pity that this project was never

The first of this series of articles began with a section headed *Purposes and Limits of the Present Study*. This again says something not only about the aim of the series but also about Fitzmaurice's approach to jurisprudence; and it is worth citing a few lines of it.<sup>121</sup> After referring to the volume of authority found in decisions of the Court, he says:

It is the purpose of the present study to call attention to the existence of this body of statements of principle, by extracting and assembling in classified form, and with such comment as may be necessary to explain their bearing and effect in the context in which they were made, all the conclusions and findings of the Court (and, within certain limits, of individual Judges) presenting features of general interest from the standpoint of international law and procedure. It follows that the object is both a specialized and a limited one: in particular, it is not the intention to give an account of, or to comment on, the cases *as such* with which the Court has been called upon to deal. So far as this study goes, these cases are the framework within which the Court has made general statements of principle. A good deal will naturally emerge as to the actual decisions in the cases themselves, but this will be incidental. Frequently, the decision or opinion of a judicial tribunal has no general interest except in relation to the particular facts of the case. What is of *general* interest is the underlying principle: the immediate decision or opinion may turn simply on how that principle is to be applied to the circumstances of the case, or to the terms of the treaty provisions under consideration.<sup>122</sup>

The purpose of the exercise thus modestly described gives little indication of the magisterial series which in the event was produced for a decade. For had it been, as seemed to be suggested, a sort of repertoire of *dicta*, this would have been a surprising undertaking for a lawyer trained in the common law. One might expect a common lawyer to be suspicious of any collection of *dicta* divorced from their context of the issues between particular parties in a particular case;<sup>123</sup> even although the common law

realized. To have those articles assembled in book form, with a consolidated index, would be a boon to every serious student of public international law.

<sup>121</sup> Loc. cit. above (p. 46 n. 117), p. 1.

<sup>122</sup> See also this *Year Book*, 35 (1959), p. 184: '... it may be as well to remind the reader that these articles do not purport to contain a detailed statement, account or analysis of the various cases—still less do they aim directly at a criticism or even evaluation of the decisions or opinions, as such, given by the Court. If an analysis or evaluation (whether of the case as a whole or of any particular part of it) emerges, this is as incidental to—and as a necessary part of—the main task which this series endeavours to carry out; namely, by considering the various cases against the doctrinal background of international law, to isolate and bring into relief what they have of general interest from the standpoint of international law and procedure as a whole, as opposed to that of the facts of the particular case.'

<sup>123</sup> For the common law method of extracting the *ratio decidendi* of a case, the only authoritative part of the precedent, see, e.g., Allen, *Law in the Making* (2nd edn., 1930), p. 155: 'Any Judgment of any Court is authoritative only as to that part of it, called the *ratio decidendi*, which is considered to have been necessary to the decision of the actual issue between the litigants. It is for the Court, of whatever degree, which is called to consider the precedent, to determine what the true *ratio decidendi* was.'

See also Goodhart, *Essays in Jurisprudence and the Common Law* (1931), at p. 25: 'The rules for finding the principle of a case can, therefore, be summarized as follows:

'(1) The principle of a case is not found in the reasons given in the opinion.

'(2) The principle is not found in the rule of law set forth in the opinion.

'(3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case, and the Judge's decision.

system of strictly binding precedent is obviously unsuitable for importation into international law.<sup>124</sup>

In fact what emerged in Fitzmaurice's series, or cycles, of articles was something much more suited to the needs of international law than that first description of intention had seemed to suggest. Far from being merely a repertoire of judicial statements of rules and principles of general interest, it freely uses other relevant material, such as the pleadings of the parties in a case,<sup>125</sup> from writers, and also from the pronouncements of courts other than the International Court of Justice. In fact its subject-matter, or at any rate what rapidly became its subject-matter, was not so much judicial pronouncements from the International Court of Justice, as full and thoughtful commentaries on those parts of international law with which the Court had been called upon from time to time to deal, taking primarily into account the Court's pronouncements on that subject. The aim is all the time to construct, with the aid of the Court's Reports, a consistent, systematic, reasonable, workable, and predictable law: a system of law bearing not only the authority of the highest Court, but also that authority in which Fitzmaurice so fervently believed, the authority that comes of consonance of the conclusions with sound and logical juridical reasoning and analysis. The result, in short, was that what could have been a useful guide to the Court's jurisprudence was, in Fitzmaurice's hands,

'(4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision based on them.

'(5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion . . .'

<sup>124</sup> See Appendix to the late Professor Goodhart's inaugural lecture, *Precedent in English and Continental Law*, delivered at Oxford in 1934 (the date needs to be emphasized): '... Which method of precedent—English or Continental—is the more likely to be followed by the Permanent Court of International Justice in the development of international law? The answer will depend primarily upon which of the two following conflicting interests it is most desirable, at any particular time, to attain. As international law is still so vague that some authorities, even at the present day, deny to it the name of law, it is important that it should be given a more rigid and determinate character. No method could be more advantageous in accomplishing this purpose than the common law doctrine of precedent. But, on the other hand, this fixation of international law must be undertaken in a cautious manner for, as there is no legislative body which can amend the law, it is essential that a certain freedom of action shall be left to the judges. Although, as Sir John Salmond has said, the English Courts have been engaged in "forging fetters for their own feet" it has always been possible for Parliament, in the last resort, to strike off these shackles, but an International Court cannot fall back upon such outside aid. It must, therefore, be careful not to bind itself in such a manner that its power and authority are curtailed for the future.'

But see also this *Year Book*, 34 (1958), at pp. 157–8, where Fitzmaurice draws attention to the suggestion made more than once by Judge Read that the Court may actually be bound by its former decisions. Characteristically Fitzmaurice then, for the greater certainty of the law, sets about reconciling the two views of the place of precedent in international law: 'How are these positions to be reconciled? It would seem that, although the Court is not obliged to decide (and indeed, in view of the opening phrase of Article 38 (1) (d), cannot decide) on the basis of previous decisions *as such*, what it can do is to take them fully into account in arriving at subsequent decisions, and that (also on the language of the Article) it is mandatory for it to apply judicial decisions in the sense of employing them as part of the process whereby it arrives at its legal conclusions in the case.' He adds a note, reminding the reader that 'The drafting of Article 38 is, of course, noticeably defective, and not only as regards this particular provision.'

<sup>125</sup> For example, see vol. 30 (1953), p. 12 n. 1 and 2; and also the full use of pleadings in the discussion of critical date, vol. 32 (1955–6), pp. 20–44.

made into a systematic treatise on international law of the highest importance both to the proper understanding of the subject and to its better development. For throughout it exhibits to the full that remarkable intellectual capacity that Fitzmaurice had of being able to deal meticulously with highly technical detail, while never for a moment losing sight of general principle.

There is another aspect of Fitzmaurice's intellectual approach to international law that is especially important in these articles. It was Lord McNair, Fitzmaurice's mentor at Cambridge, who once declared:

Whereas I may have thought, as a teacher or as the author of a book or an article, that I had adequately examined some particular rule of law, I have constantly found that, when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgment, I have been struck by the different appearance that the rule of law may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in a text book it may sound the quintessence of wisdom, but when you come to apply it many necessary qualifications are apt to arise in your mind.<sup>126</sup>

It was a characteristic of Fitzmaurice as a legal technician that, perhaps because of his constant immersion in the practice of the law, but certainly also because of his sheer power of intellect and of imagination and application, he was able to perceive those necessary qualifications and distinctions with remarkable accuracy, and to systematize them and relate them to principle. Sometimes, it should be said, his perseverance in analysis, and further analysis, could be so extended and dogged as to weary some who found a blander understanding of the law more comfortable to live and work with. Yet many a practitioner has been thankful to find that his difficult and seemingly novel problem thrown up by a curious and unexpected turn of the facts has been anticipated by Fitzmaurice.

The consequence of this treatment is, therefore, that the series became a general treatise on international law, though necessarily limited to those aspects or questions suggested by a decade of the Hague Court's jurisprudence. Inevitably, there are gaps. Yet it is remarkable how much ground is covered, especially in the course of the second and much longer cycle. For it should be noted that since the author was dealing not with the facts and issues of particular cases but with the principles and general rules of law raised in those cases, he does not by any means confine the discussion to the problems raised in the cases, but is free to speculate on other problems that could hypothetically arise. And thus is this treatment of the principles of the law made into a guide to the several different categories of related problems that might or could arise, whether they have yet appeared in actual cases or not. Accordingly, this series of articles is one which certainly no practitioner of the law can afford to pass by.

<sup>126</sup> See *Lord McNair: Selected Papers and Bibliography* (1974, ed. Parry), p. 257.

Obviously it is neither possible nor desirable within the compass of this article to attempt even to summarize the wide-ranging content of the whole series of three cycles of cases. It may be useful, nevertheless, in order to give some idea of the broad sweep and range of the work, to list a selection only of some of the more important topics, certainly of 'general interest', that are dealt with; and by a few brief references to the actual discussion, to give some idea of the virtues of the method, because they are to an important extent virtues which belonged especially to Fitzmaurice's modes of juristic thought.

Take then, for example, the third article of the first cycle.<sup>127</sup> This begins with a 'chapter' headed 'International Organizations, with particular reference to the United Nations and the Charter'. Division A of that chapter concerns 'Some Fundamental Questions': international personality; general powers of international organizations; succession or devolution as between international organizations; status of international officials. For the method of discussion let us take the treatment of the very important question of implied powers of international organizations. It was, of course, in the *Injuries* case that the Court<sup>128</sup> held that

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.

This fertile and important idea is not, however, free from difficulty nor from danger of abuse, though this particular passage from the Court's opinion is usually cited without reference to another possible view of the powers of international organizations. Fitzmaurice, however, following meticulously his chosen method of the whole jurisprudence of the judges, brings the Court's view as he says 'into relief' by immediately contrasting it with the view of Judge Hackworth who dissented. Hackworth opined that:

Implied powers flow from a grant of expressed powers, and are limited to those that are 'necessary' to the exercise of powers expressly granted.<sup>129</sup>

In this way, by putting the rival views on this particular point in juxtaposition, the view of the Court itself is made the clearer and the reader is able to realize how far the Court went: for Hackworth's view of the matter was, of course, the one, as Fitzmaurice again does not fail to point out, 'of fairly general validity in municipal and domestic law'. Then, however, it is pointed out that there is in fact yet another view—that of Judge Alvarez not in the *Injuries* case but in the (*First*) *Admissions* case.<sup>130</sup>

... an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with

<sup>127</sup> *This Year Book*, 29 (1952), pp. 1-62.

<sup>129</sup> *Ibid.*, p. 198.

<sup>128</sup> *ICJ Reports*, 1949, at p. 182.

<sup>130</sup> *Ibid.*, 1948, at p. 68.

the views of those who created it, but in accordance with the requirements of international life.

So now it is clearly seen that 'there are thus three possible views as to the general powers of an international organization, the Court's being the middle view'; and Fitzmaurice then summarizes the three possible views shortly and clearly. This discussion of implied powers is but one and a half pages; but any inquirer will probably get a far clearer idea of the outlines of the problem of implied powers of international organizations in the few minutes it takes to read it, than he would glean from the Court's *Reports* unless after a very extensive perusal and consideration of many pages of them. What is more, this treatment of the general powers of international organizations then leads into a discussion, also very exact but very economical, of the 'bearing of the political character of an international organization on its powers' (the (*First*) *Admissions* case) and 'power of dissolution' (the *South West Africa* case), both matters which clearly ought to be considered alongside implied powers, but seldom are. It is not possible to indicate more than this small sample of this long 1952 article.<sup>131</sup>

The much longer and even more developed second cycle of articles is so extensive and so important that to attempt even to list the main topics would run the risk of being an inadequate indication of the value of its content to any serious student of international law. Some parts of it, however, it will be convenient to refer to where they are linked with Fitzmaurice's other writings;<sup>132</sup> though perhaps specific mention should be made of the long and thorough treatment of the critical date (making extensive use of the pleadings in the *Minquiers* case) for this is indeed the *locus classicus* of that doctrine;<sup>133</sup> and also of the exhaustive and powerful treatment on 'Questions of Jurisdiction, Competence and Procedure'.<sup>134</sup> This is not so much an article as an extended monograph. It covers, *inter alia*, the status of resolutions of the United Nations General Assembly; the general principles of jurisdiction and competence; the inherent power of international tribunals to determine their own competence; the principle of consent; the *non ultra petita* rule; the jurisdiction to indicate interim measures of protection; third-party intervention; limits of the judicial function and jurisdiction to decide *ex aequo et bono*; Article 37 of the Court's Statute; advisory jurisdiction; evidence and proof; procedural points (such as submissions, irrelevant arguments, precedents, *res judicata*). Besides its broad sweep over the whole field of a major question

<sup>131</sup> Though it may be worth adding that readers may find at p. 40 one of the few clear and straightforward descriptions of the difference between 'jurisdiction' and 'competence'.

<sup>132</sup> See, for example, the 'basis and foundation of State rights' which appears in the 1953 volume of this *Year Book*, p. 8, and has its fellow treatment in the Hague General Course; also the sections on treaty interpretation (in the 1957 volume of this *Year Book*), and see p. 25, above. See also the relationship of international and municipal law at p. 54, below.

<sup>133</sup> See this *Year Book*, 32 (1955-6), pp. 20-44.

<sup>134</sup> *Ibid.* 34 (1958), pp. 1-161.

of international law, the monograph also ranges not only over the jurisprudence of the Court but over the relevant writings.

In discussing Fitzmaurice's commentaries on international law, attention has been called to his talent for, and pleasure in, the analysis of legal concepts and of legal situations. But it would be very wide of the mark if one were to get the impression that the quality of his writings (whether writings in the sense of commentaries or in judicial opinions) is confined to the resolution of complex ideas and concepts into their simpler elements. For interwoven with this talent for analysis of legal concepts, in itself a creative though technical operation, there is his prodigious learning, and tireless application and thoroughness; but there is also great originality and the creative imagination of the artist.

The illustrative example that comes to mind is the treatment already mentioned above, of the doctrine of the 'critical date' as applied in the law governing the acquisition and loss of territorial sovereignty. The critical date is inexorably coupled with the name of Fitzmaurice. In the United Kingdom pleadings in the *Minquiers and Ecrehos* case, he took from the *Palmas* case and the *Eastern Greenland* case little more than the incidental use of the term and wove from it a doctrine of some complexity and high sophistication. In fact, Fitzmaurice might, without unreasonable exaggeration, be said to have 'invented' the whole concept; provided invention is understood in its primary meaning, of coming across it in the course of the thorough investigation, thought and analysis of a situation giving rise to legal questions, and systematizing and rationalizing the result. The critical date was taken up again and dealt with even more substantially, in a 'Law and Procedure' article in this *Year Book*,<sup>135</sup> which is a *tour de force* in marshalling and systematizing a large number of delicately shaded distinctions and possibilities. It is, in fact, the one article where the author begins with a warning note: '*This section breaks some new ground, and the views put forward are tentative.*' Nevertheless, he does not neglect to state very clearly<sup>136</sup> the actual conclusions he sees resulting from the Court's finding in the *Minquiers* case.<sup>137</sup>

<sup>135</sup> Vol. 32 (1955-6), pp. 20-44.

<sup>136</sup> *Ibid.*, pp. 39-40, where he states:

'(c) *Conclusions resulting from the Court's finding.* These may be stated as follows:

'(i) There is a critical date in territorial disputes as at which (or with reference to the situation existing at which) the question of sovereignty falls to be determined.

'(ii) This date is *prima facie* the date at which the dispute on the issue of sovereignty "crystallizes".

'(iii) The date of crystallization is itself *prima facie* the date at which the party not in possession of the territory makes a formal claim to it—(but it may equally be the date on which the party having, or claiming to have, title challenges the action of the party seeking to acquire it).

'(iv) However, the conduct of the parties in relation to the claim is material to the question of what is the critical date. Therefore, it will not always follow that the critical date will be that which would otherwise result from principles (ii) and (iii).

'(v) *Prima facie*, the establishment of a critical date excludes consideration of all acts and events subsequent to it (subject to the rule discussed in subsection (5) below).

'(vi) In the "special circumstances" of a given case, and more particularly where "activity in regard to [the territory] had developed gradually long before the dispute as to sovereignty arose, and . . . has

It might be thought odd that, from the origins of a pleader's brief, there should arise a doctrine so subtle, complex and delicately balanced that few courts would have the intellectual energy to pursue it in all its ramifications. To leave it there, however, is to fail to realize the significance of Fitzmaurice's work on the critical date. In his thinking about one aspect of his pleader's task in the *Minquiers* case, he had seen a vision of an examination of it, which would illuminate and explain a large and very important part of the law of the acquisition of territorial sovereignty. Indeed in any law concerning propriety in territory, the effect of the passage of time, and of particular conjunctions of time, is so important that no proper appreciation of the matter is possible without an understanding of this factor. This is precisely what Fitzmaurice has provided. One reads Fitzmaurice on the critical date, not only to learn about that critical date, but to begin to understand clearly and anew what the law of the acquisition of territorial sovereignty is about.

So it is no accident that the *Year Book* treatment of the critical date is followed by, and in effect forms part of, an equally masterly examination of 'Considerations Governing the Determination of Title in Territorial Disputes', again based on the *Minquiers* case, but also ranging much more widely. It is not possible here to do justice to some thirty closely argued pages, which are so full of ideas that they defy summary. Yet it would be wrong not to remind the reader that they exhibit all through those insights that are typical of Fitzmaurice's work.

For example, under the general heading of 'Fundamental Principles Governing Title to Territory', he begins with the principle that (1) *The Disputed Territory must be capable of Possession or Appropriation in Sovereignty*. Here there arises of course the question of drying rocks, shoals, banks, and the like. For this was an issue in the *Minquiers* case, the *compromis* having requested the Court to determine the question of sovereignty over the islets and rocks of the groups 'in so far as they are capable of appropriation'. And as Fitzmaurice points out, the Court in its finding implicitly endorsed the rule that certain kinds of territory are not capable of appropriation in sovereignty at all, and he sets out the 'usual case' of such territory, namely the island, rock, bank or shoal only uncovered at low tide. Many commentators would stop there and pass to the next heading, the announced task accomplished. But Fitzmaurice goes on:

However, this case may have been rendered less simple in its application than formerly, by reason of the modern doctrine of the continental shelf. If territory is since continued without interruption and in a similar manner'', there may be grounds for admitting consideration of post-critical date acts and events.

'(vii) This may lead in practice to diverse critical dates, one for the evaluation of one party's claim, and the other for the other party's; and this will result from the fact that, in the circumstances, the acts of the one party subsequent to the critical date are to be regarded as eligible for consideration, but those of the other, not—(and see subsections (2) (f) and (g) above).'

<sup>137</sup> *ICJ Reports*, 1953, p. 47.

claimed as continental shelf, the mere fact that it is submerged is irrelevant to the claim, the validity of which will depend on other factors (and in any event no territorial waters will be generated); but if the territory is claimed as land and not as seabed, then the question of submergence remains fully relevant . . .<sup>138</sup>

Now this looks simple, right and even obvious, once it has been said. But where, as is ordinarily the case, acquisition of territorial sovereignty is dealt with in one chapter, and continental shelf in another, it is not so easy to pick up that fertile idea that there can now be different kinds of claims to the same territory; and, moreover, that it is by no means entirely clear whether they both amount to 'territory' or not.

The third cycle has one article only,<sup>139</sup> the remainder having been overtaken by Sir Gerald's own election to the Court. We have already seen how it deals with the relationship of international and domestic law. But it should not be supposed that the series deals only with the big subjects. A lot of smaller but still significant issues receive attention. For example, in this final article, whilst dealing with the International Court of Justice 1954-9, there is section 5<sup>140</sup> which deals with comments upon several judicial pronouncements found in three cases from that period (though others are cited incidentally). That section has the general heading: 'Affirmations of Certain General Legal Maxims'. And the section deals in turn with the three maxims: *cessante ratione, cessat ipsa lex*; *jus posteriori jus priori derogat*; and *nemo in re sua (in sua propria causa) judex esse potest*. And under each maxim there is not only the judicial pronouncement that gave rise to the author's reflections on the matter, but the usual Fitzmaurice rigorous analysis of distinctions, applications and exceptions.

But enough has been said to show how this project, which in other hands could so easily have been a very useful digest or repertoire, was in the event one of the most powerful and influential commentaries on public international law that we have.

There should perhaps be added, as nearly related to this series, in so far as it deals with the law and procedure of the International Court of Justice, the late article in this *Year Book* on 'The Problem of the "Non-Appearing" Defendant Government'.<sup>141</sup> It is interesting that the few very late articles, that is to say particularly those after he had retired from the bench, are more hard-hitting and have almost a testamentary element.<sup>142</sup> The non-appearing defendant was a problem which caused him much

<sup>138</sup> This *Year Book*, 32 (1955-6), pp. 47-8.

<sup>139</sup> Ibid. 25 (1959), pp. 183-231.

<sup>140</sup> Ibid., pp. 216-29.

<sup>141</sup> Vol. 51 (1980), pp. 89-122.

<sup>142</sup> His death was sudden but he seems to have been anticipating it in some of his later work. Thus in *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte*, the Festschrift for Hermann Mosler (1983), he explains after the necessary preliminary study: 'I had neither space, time, nor energy for what I had originally intended which, accordingly, must await another occasion—if there ever is one.' This was in fact his last published article, though it is believed that he had also prepared part of an intended study of international law as reflected in the first fifty volumes of this *Year Book*.

anxiety, and it was Fitzmaurice who persuaded the Institut de Droit International to make it the subject of one of the Francis Lieber Prizes. He describes the position of the non-appearing defendant not without a note of contempt, as being 'like an actor who refuses to perform his part on the stage but speaks his lines from the wings so as to be heard in the auditorium';<sup>143</sup> with its 'broad consequence, namely (to put it colloquially) that the practice was one that enabled the defendant—i.e. non respondent—State to have it both ways'.<sup>144</sup> But his chief censure is for the inadequacy of the Court's pronouncements in the now several cases of non-appearance, with their 'distressing sameness, the language employed in the one case doing duty, with only slight variations and in almost the same words, for the others', the 'extremely mild and quite uncensorious terms' in which the practice was referred to by the Court, and 'the total failure to recognize the prejudice thereby caused to the plaintiff State, although the difficulty caused for the Court itself was mentioned in some cases'.<sup>145</sup> A primary difficulty of course is the 'proper interpretation of Article 53 of the Statute of the Court'.<sup>146</sup> Fitzmaurice thought it wrong that the defendant which decided not to appear, yet at the same time communicated to the Court such arguments as it wished to bring to the attention of the Court, should actually reap an important advantage because (a) it did not have to conform to the Rules of the Court about the form and timing of pleadings, when submitting such pleadings, as it were, on the side; and (b) the plaintiff State on the other hand was faced with the burden of satisfying the Court that it had jurisdiction without being able to shift the burden of proof and leave it to the respondent to try to show why the Court did not have jurisdiction. Accordingly he felt that where there existed a *prima facie* case that the Court had jurisdiction, then the Court ought 'to inform the Government impleaded that unless it appears before the Court to show cause why jurisdiction should nevertheless not be assumed, the Court will proceed to do so, and will go on to hear and decide the merits'.<sup>147</sup> He goes on to discuss and to dismiss the various arguments that have been used to provide an apologia for the Court's attitude to the problem which 'bids fair to become a quasi-permanent feature of the international legal sky, suffusing the system in such a way that while the outward shell of it remains intact—i.e. the mutual ostensible acceptances of the Court's compulsory jurisdiction—the core is washed away and replaced by what is no more than a variety of *forum prorogatum*—an invocation of the Court's jurisdiction on the one side, and an acceptance (or not) on the other, at will'.<sup>148</sup>

<sup>143</sup> Loc. cit. above (p. 54 n. 141), p. 91.

<sup>144</sup> Ibid., p. 94.

<sup>145</sup> Ibid., p. 106.

<sup>146</sup> Article 53: '1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim. 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.'

<sup>147</sup> Loc. cit. above (p. 54 n. 141), p. 113.

<sup>148</sup> Ibid., pp. 115–16.

It is, of course, possible to take a different view of this problem even from a quite strictly technical point of view.<sup>149</sup> But it is impossible not to appreciate the passion that underlies this article by Fitzmaurice. The cause of his concern—it would be juster to say distress—was the apparent erosion even of that measure of compulsory jurisdiction which had seemed to have been achieved; an erosion which seemed to him to have been assisted by the pusillanimous attitude of the Court itself. The result, as he does not fail to point out, is virtually a return to the nineteenth-century position when governments would plead ‘vital interests’ as a reason for non-submission to arbitral settlement. Fitzmaurice was certainly not at all unaware of the present limitations of the adjudicatory process in present international relations, nor indeed at all unsympathetic with those governments that sometimes find difficulty in taking their disputes to an international tribunal. What distressed him about this line of cases was evidently the retrogression involved—the loss of what had already seemed in some important measure to have been achieved—and that this retrogression should seem to have been met by the Court with no more than quite formal expressions of regret and no attempt at even the sanction which Article 53 seems apt to provide for.

(b) *The International Law Commission Reports on the Law of Treaties*

Perhaps nowhere else amongst his many writings is the strength, and perhaps also the limitations, of Fitzmaurice’s analytical method more evident than in the monumental series of Reports on the Law of Treaties which he made as Special Rapporteur of the International Law Commission.<sup>150</sup> These, like all such reports for the Commission, are cast in the form of draft articles with comment; but the articles of Fitzmaurice’s Reports are ratiocinative rather than normative in both form and content.<sup>151</sup> He evidently felt under an intellectual obligation to reveal

<sup>149</sup> See Thirlway, *Non-Appearance before the International Court of Justice* (1985).

<sup>150</sup> ‘... from 1956 to 1960, Sir Gerald Fitzmaurice presented five separate and comprehensive Reports on the Law of Treaties, covering respectively (a) the framing, conclusion and entry into force of treaties (A/CN.4/101); (b) the termination of treaties (A/CN.4/107); (c) essential and substantial validity of treaties (A/CN.4/115); (d) effects of treaties as between the parties (operation, execution and enforcement) (A/CN.4/120), and (e) treaties and third States (A/CN.4/130)’: see the first Waldock Report in A/CN.4/144 of 26 March 1962.

<sup>151</sup> For form, one short example will suffice to illustrate the tendency: his draft Article 14 is headed: ‘The Treaty considered as Text and as Legal Transaction’. Para. 1 reads: ‘A treaty is both a legal transaction (agreement) and a document embodying that transaction. In the latter sense, the treaty evidences but does not constitute, the agreement.’ As his successor, Sir Humphrey Waldock, as Special Rapporteur, put it (see ‘The International Law Commission and the Law of Treaties’, *UN Monthly Chronicle*, 4, no. 5 (May 1967), p. 69 at p. 71): Sir Gerald Fitzmaurice, ‘... starting from the position that “it is inappropriate that a code on the law of treaties should itself take the form of a treaty”, ... presented drafts cast in the form not of a codifying Convention but of an expository restatement of the law: drafts which were, therefore, elaborate in their detail and included some purely descriptive or explanatory provisions’.

every significant distinction and to indicate different possible logical rationalizations. It must not be supposed that this exercise was by any means a purely academical one; these were precisely the differences that may be of importance and even decisive of a practical problem or dispute. For Fitzmaurice had the great gift, a consequence of a fertile imagination coupled with considerable practical experience, of being able to anticipate the kind of out-of-the-way question that is thrown up in real cases. So his Reports form a kind of Baedeker's guide to what would otherwise be unanticipated situations and differences that might be thrown up in the application of the law. This was of course not the stuff from which a codifying convention, with its broad statements of general principles and rules, and especially, its compromises, ambiguities and questions begged, could immediately be drafted. Nevertheless, it was this penetrating study in depth of the subject of treaty law that laid the intellectual foundation which enabled his successor as Special Rapporteur, Sir Humphrey Waldock, to achieve that highly successful draft which led to the triumph of the Vienna Conference and the resulting Convention on the Law of Treaties. For the fact of the matter is that Fitzmaurice, in his five Reports, provided a major treatise on this branch of the law: a treatise of a kind that could probably only have been accomplished by one who was a scholar of an academical bent, but who nevertheless had been compelled by the nature of his career in the law constantly to study and appreciate real situations.<sup>152</sup>

There is a further important point to be made about Fitzmaurice's highly analytical, and in consequence very full, not to say lengthy, method of proceeding with this work. His elaborate systems of classification, and the full airing of each significant distinction, were not indulged without a clear, practical purpose in view. For Fitzmaurice saw that this degree of analysis in depth was in fact necessary if his exposition was to be accurate. An exposition which left out a possibly important distinction, even if from some points of view expedient, would have struck him as being not only incorrect, but also to that extent misleading. Accordingly, it should be emphasized that his intellectual labours in those Reports are by no means superseded by the Vienna Convention. On the contrary, they provide a

<sup>152</sup> Fitzmaurice was engagingly insistent on what was at the same time his strength and his limitation. Thus, in his introductory observations on his first Report, he is already expressing misgivings over the work of his predecessor's draft articles, even though they had 'admirably full and informative commentary', yet, he goes on, 'the articles themselves to which this commentary related were few in number, and to some extent general in character—at any rate they were not intended to go into much detail'. But then he puts his finger on the great strength and value of his own method. For, he says, the method of using more general articles is 'bound to leave out of account a number of points—and more especially situations—that in practice tend frequently to occur in the process of treaty-making, and give rise to difficulty and uncertainty'. Yet though the aim to deal with such points and situations is admirable, and though Fitzmaurice was certainly the man to do it, it is suited to the treatise rather than the code. But fortunately for the study of international law, he was not to be deflected from using his full intellectual power. In para. 5 of this introductory observation, he points out that he is now presenting thirty articles dealing entirely with the process of treaty-making, in place of the six such articles of the previous reports!

scholarly, systematic exposition of the fundamental problems of the law of treaties that will remain a primary work certainly for a very long time to come. Indeed, the existence of the Convention makes work of the Fitzmaurice kind all the more essential.<sup>153</sup>

It must also be remembered that Fitzmaurice's idea of the form an eventual code on the law of treaties should take was very different from what was eventually to emerge. In his first Report he said this:

9. Certain other matters of form or method may be mentioned. The first has already been touched on. So far as the process of treaty-making and conclusion is concerned, the problems connected with it cannot clearly emerge, unless the code attempts, within certain limits, to paint a picture—unless in fact it has a descriptive element. Secondly, the Rapporteur believes that any codification of the law of treaties, such as the Commission is called upon to carry out, should take the form of a *Code* and not of a draft convention. There are two reasons for this. First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty—or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principle and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.

Certainly one recognizes there the pull of the way that Fitzmaurice *liked* to do things. He strongly wished not only to enunciate the governing principles but also to demonstrate in clear terms the precise way in which rules were to be derived from the governing principle; as he put it, he wanted his code 'to paint a picture', and to do that he wanted 'a descriptive element'. It was also characteristic that he should see so strongly the logical difficulty of putting a code on the law of treaties in treaty form. In terms of legal logic the objection is unassailable. It is true that his successor, to whose particular skills and talents the success of the Vienna Conference was largely due, saw no difficulty in having a treaty on the law of treaties; and in the event this is what we now do have.<sup>154</sup> But it is also far

<sup>153</sup> Almost any draft article in any of the five Reports will serve to illustrate this point. But a quickly comprehended example of the importance of making distinctions might be Article 1 of Part II of the Fifth Report. This Article is a definition provision and is confined to a definition of 'a third State'. This might at first sight be supposed a very simple matter. The Article in fact runs to five considerable paragraphs; none of which, however, can be discarded if one wants to know all the principal kinds of questions that may arise in this regard.

<sup>154</sup> For this 'radical change in the Commission's approach to its work on the law of treaties', see Waldock's First Report, Doc. A/CN.4/144 of 26 March 1962, para. 7. The reasons given for the change (see Waldock, loc. cit. above (p. 56 n. 151), at p. 71) were: 'The Commission had two main reasons in 1961 for abandoning the expository code advocated by Sir G. Fitzmaurice in favour of a draft Convention. First, an expository code would not in the nature of things be so effective an instrument as a Convention for consolidating international law. Secondly, the appearance on the scene

from established that Fitzmaurice was wholly in error in his analysis of the position and in his objection to a treaty on the law of treaties. The Vienna Convention on the Law of Treaties was constantly cited as a code years before it came into force as a treaty. And even since it came into force it is often used as a statement of the law rather than a contractual arrangement. It is true that Fitzmaurice perhaps did not foresee the extent to which the Convention would in important respects be innovatory. Yet even these innovatory rules are not stated in terms which suggest that they would be binding only between ratifying parties, and that the older rules about reservations—whatever they might have been—would be the general law for non-parties. But, indeed, Fitzmaurice's logical and juridical doubts still go further than applying merely to a code on the law of treaties. They arise in respect of all attempts to codify *and* to develop the general rules of customary law in the form of a treaty subject to the legal requirements and effects of signature and ratification.<sup>155</sup> True, the many attempts have succeeded in that they have produced important and valuable international instruments. But basic juridical questions arise which are still without a clear and satisfying solution.

## IX. FINAL REFLECTIONS

The latter part of the present article has been concerned with two major works—the series in this *Year Book* on the law involved in the work of the Hague Court, and the work on the law of treaties for the International Law Commission—which are devoted to particular branches of substantive or procedural law rather than looking at law as a whole as, for instance, in the Hague General Course, or the essay on the future of international law, which feature in the earlier part of the present article. It need hardly be

of so many new States had made the consolidation of the law of treaties a matter of pressing importance and the opportunity given to the new States by a diplomatic Conference to participate in the determination of its rules would do much to place the law of treaties on the widest and most secure foundations. Five years of intense study of the subject in the Commission seem to confirm the wisdom of its decision. They showed that disputed points exist not merely on matters of detail but on many basic questions, as for example: the place given to "ratification" in modern treaty law; the rules governing reservations to multilateral treaties; the international significance of constitutional limitations upon the conclusion of treaties; the principles of interpretation; the application of successive treaties relating to the same subject matter; treaties and third States; the amendment of multilateral treaties; the significance of a change of circumstances or of a breach of treaty in relation to its termination; the impact on the law of treaties of the existence today in the international legal order of peremptory rules from which no derogation may be permitted (*jus cogens*). In consequence the task of the Commission was far from being simply one of the scientific arrangement and formulation of accepted law, but more often than not required the harmonisation of and even the choice between different views of the law. . . .'

<sup>155</sup> This of course is the burden of his important article on 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl* (1958), discussed in more detail at p. 27 above. And see also the paper cited in his note 2, p. 50, where he puts the difficulty in a nutshell: 'If the obligation to conform to the law of treaties is itself dependent on a treaty (a treaty declaring the law of treaties), then what is the position of States which do not become parties to the treaty?' What indeed! Answers may vary but the question is still pertinent and requires an answer.

said that this division has been for convenience of exposition: there are not of course two distinct kinds of Fitzmaurice writings. They all belong together. Furthermore, it must be emphasized that besides the *Year Book* articles on the Court and the work for the Commission, there are very many other articles that deal with particular branches of the law, as a glance at the attached bibliography will clearly show. They are scattered in many journals published in many parts of the world; for Fitzmaurice was always generous in his response to requests of editors for articles. This, however, should not be allowed to obscure the fact that taking this corpus of writings as a whole there are here the elements of a treatise covering virtually the whole field of public international law, from the technicalities of procedural law to the large issues of war and neutrality. It is a treatise, moreover, that exhibits throughout that very special quality of all his work, of meticulous mastery of detail and technicality yet never losing sight of general principle nor of the requirements for the furtherance of the rule of law in international affairs. Moreover, those articles written some time ago and which have been overtaken by changes in the law are still, if not essential reading, at least highly instructive. To take one example: the 1953 article<sup>156</sup> on that tricky question of reservations to multilateral treaties is still, if not exactly essential reading, certainly very helpful reading for anyone who wants to understand the kind of problems that arise, and the different ways in which the law could deal with them—even though the article was of course written long before the Vienna Convention.<sup>157</sup> Because the sweep of these articles is so considerable it has not been possible to do more than to sample here and there to illustrate their method and value. But we must be thankful that Fitzmaurice was impelled by love of and devotion to the subject of public international law to write over this considerable period of time these elements, as we have called them, of a general treatise; and we can note with affectionate amusement and also gratitude that, when appointed Special Rapporteur to the International Law Commission, on the law of treaties, he was temperamentally quite unable to do other than to produce an ‘expository restatement’<sup>158</sup> of the law. We may indeed regret that he was not able eventually to pull together into one publication this invaluable and important corpus of learning, if not in the form of the treatise he must surely have wanted to write, at least in the form of collected papers. Yet it should also be remembered that he was prevented from doing this by his immersion in the practice of the law, which continued right up to the end, and which was of course a principal reason why his writing is so important. It must be rare indeed that a scholar of the first order has enjoyed the benefit of a full experience of practice—as adviser, as judge and as

<sup>156</sup> *International and Comparative Law Quarterly*, 2 (1953), pp. 1–26.

<sup>157</sup> See also the study of the effects of the judgment in the *Genocide* case in this *Year Book*, 33 (1957), pp. 272–93.

<sup>158</sup> See p. 56 n. 151, above.

counsel—and has yet had the energy and the devotion to write all the time as well.

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One who attempts an appreciation of the work of a master cannot expect to reach its end without realizing its inadequacy; indeed to deal adequately with some fifty years' work by a dedicated genius is by definition an impossible task. But the present writer will be content if he succeeds in persuading any international lawyers who might not otherwise do so to look again at the writings of Fitzmaurice; and especially to ponder his teachings about the imperative juristic and intellectual requirements for the establishment of the rule of law in international relations. Of course any international lawyer who is something more than a mere journeyman will be able to claim—should be able to claim—no less a dedication to that cause. But Fitzmaurice in his writing and thinking went far beyond the cherishing of a proper sentiment. He gave his powerful mind, and his mastery of the details of the subject, borne of decades of experience, to working out the implications of the idea of the rule of law for every aspect of the system.

It is timely to look again at these ideas of his. In a society of States much divided by ideologies, by religion, by poverty and wealth, by power and weakness, by size, by history and by geography, it is well never to lose sight of the fact that the one vocabulary of ideas that they have in common is public international law. It is no accident that the major differences and areas of dispute between nations have in recent years been expressed in terms of different views of what that law is or should be. It is a paradox of the kind that Fitzmaurice used to like to savour that juridical arguments about international law have in the last decades provided one of the most powerful of political tools. One might not be persuaded to go along with all Fitzmaurice's ideas. Time will show some to have been right and some wide of the mark. But his central message was surely timely and right: at all costs to preserve the intellectual integrity of the system, without which the rule of law cannot be extended and strengthened, but must rather be weakened.

It seems fitting to end with part of the final paragraph of the speech of the Public Orator of Cambridge University, then Mr Patrick Wilkinson of King's College, when he presented Fitzmaurice to the Chancellor of the University for the conferment of the Degree of Honorary Doctor of Laws on 8 June 1972; for it expresses shortly and felicitously the intellectual character of the man:

But although he always devoted himself to public duties, his cast of mind is in a way scholastic. For he sees that it is only by scrupulous attention to detail that general principle can be grasped. You would guess rightly that he has an enthusiasm for mathematics. But he also has an enthusiasm for literature, especially poetry, feeling as he does that law no less than literature depends upon

elegance of phrasing. So whatever he writes himself, he in no wise shuns the labour of the file. He has often lectured on the corpus of international law, always increasing and always being clarified; and formerly he edited a most valuable series of digests and commentaries on the judgments of that court from which it is apparent that there is still someone who believes that law can be established by reason.<sup>159</sup>

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<sup>159</sup> The translation above is the official one by Mr Wilkinson. But the original speech is of course in Latin, as the idiom of the translation itself reveals. It seems right, therefore, to add the original text: 'Qui tamen ita publicis officiis semper inseruiuit, idem scholasticum quendam mentis habitum prae se fert. Videt enim non nisi singula religiose spectando comprehendi posse praecepta universalis. Mathematicae eum studere recte augureris. Sed litteris etiam studet, praesertim poeticis qui leges in uerborum elegantia uix minus illis consistere sentiat. Itaque quicquid ipse scribit, limae laborem nunquam detrectat. De juris gentium legibus atque institutis, quae cum ampliora tum dilucidiora semper fiunt, plurima disseruit, curiaeque eius iudicia ultissima olim commentariorum serie digesta edidit, e quibus apparet esse adhuc qui confidat posse ius ipsum mentis humanae ratione decerni . . .'

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# THE ARBITRATION BETWEEN THE GOVERNMENT OF KUWAIT AND AMINOIL\*

By ALAN REDFERN<sup>1</sup>

## I. PREFACE

IN the late summer of 1977, the Government of Kuwait issued a Decree Law<sup>2</sup> nationalizing a foreign oil company which had been operating under a concession from the Government for almost thirty years. The text of the Decree Law was simple. It consisted of a few short sentences only. Yet it was to lead to an arbitration conducted before three eminent international lawyers who were required to consider *inter alia* the law governing transnational arbitrations; the law governing State contracts with foreign corporations; the effect of the 'Abu Dhabi formula' on the private concessionary regime; a State's right to nationalize a foreign corporation in the face of contractual 'stabilization' clauses; and the principles of international law to be applied in assessing the compensation to be paid on nationalization.

The foreign oil company which was the object of the Decree Law was the American Independent Oil Company ('Aminoil'), a company incorporated under the laws of the State of Delaware in the United States of America. Aminoil was a small company which had been formed in 1947 by a group of individuals and of the smaller, so-called 'independent' oil companies. In 1970 the shares of Aminoil were acquired by a major American corporation, the R. J. Reynolds Tobacco Company, Incorporated. From there, the shares passed into the ownership of R. J. Reynolds Industries, Incorporated, the parent company of the Reynolds's interests. Aminoil—a small part of this transnational industrial empire—kept its name and continued to operate its concession until the Decree Law of 1977.

### *The 1948 Concession Agreement*

Aminoil's concession was granted to it on 28 June 1948 by His Highness Sheikh Ahmed Al Jabir al Sabah, who was the Ruler of Kuwait from 1921 to 1950. The concession extended over a stretch of flat and empty desert

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<sup>1</sup> MA (Cantab.), Solicitor. The writer, who is a partner in Freshfields in the City of London, was the senior counsel for the Government of Kuwait in this arbitration.

<sup>2</sup> This was Decree Law No. 124 of 19 September 1977. Article 1 provided that the concession granted to the company in 1948 should be terminated; Article 2 provided that the company's assets in Kuwait, including its refinery and other installations, should revert to the State; and Article 3 set up a Compensation Committee to assess the 'fair compensation' due to Aminoil. The remaining articles were administrative.

which lies along the Arabian Gulf, between the State of Kuwait and the Kingdom of Saudi Arabia. The area is a 'buffer zone' between the two countries. It was first designated as a 'neutral zone' (following the conference at Uquair in 1922) and then as a 'divided zone' (following a treaty made between Kuwait and Saudi Arabia in 1965, under which each State assumed sovereignty over its own sector).<sup>3</sup> Aminoil operated in the Kuwait sector of the divided zone, and shared its exploration and production facilities with the Getty Oil Company ('Getty') which operated in the Saudi Arabian sector, under a concession granted by Saudi Arabia in 1949.

The Concession Agreement granted to Aminoil in 1948 was an oil concession agreement in the classical form. It was modelled, article by article, on an earlier oil concession which had been granted by Sheikh Ahmed in 1934 to a company known as the Kuwait Oil Company ('KOC'), which was then, in effect, jointly owned by a major British and a major American oil company.<sup>4</sup>

The concession granted to Aminoil was 'on-shore' and extended over Kuwait's sector of the divided zone. It was to run for a period of sixty years. The price to be paid, apart from payments made on signature of the agreement, was a fixed royalty of US \$2.50 for every ton of petroleum 'won and saved'. There was a provision for a minimum annual royalty of US \$625,000; but there was no provision under which the Ruler would obtain a higher return if oil prices increased—as, in the event, they did—over the period of the concession. (There was a 'gold clause', to protect the Ruler against a fall in the value of paper money, but this was abolished as part of the revisions to the Concession Agreement made in 1973.)

The effect of the Concession Agreement, common enough at the time it was made, was to create a sheltered enclave for the foreign oil company. The company was empowered to construct and operate power stations, refineries, pipelines and storage tanks; to build harbours and jetties; to import goods and materials free of customs or other duties; to bring in its own skilled and technical employees and to import labour, if it judged the local supply to be inadequate or unsuitable. In short, within its area of the divided zone, the company was virtually sovereign. It was a State within a State.

There were limited provisions (in Article 11 of the Concession Agreement) for the Agreement to be terminated in the event of certain defaults by the company—failure to carry out exploration or drilling; failure to make the royalty payments; or failure to comply with the agreement for arbitration of disputes. Subject to these provisions, the company was to enjoy its sheltered status until the beginning of the next

<sup>3</sup> For the relevant documents, see Albaharna, *The Arabian Gulf States: Their Legal and Political Status and Their International Problems* (2nd rev. edn., 1975).

<sup>4</sup> The companies were the Anglo-Persian Oil Company Ltd. (which became the British Petroleum Company Ltd.) and Gulf Oil Corporation. For a fascinating account of the negotiations behind the 1934 Agreement, see Chisholm, *The First Kuwait Oil Concession* (1975).

century. Indeed, it was expressly stipulated, in Article 17 of the 1948 Concession Agreement, that no changes were to be made in the terms of the Agreement, unless the company agreed that such changes were desirable.

*The principal 'stabilization' clause*

Article 17, which was to play a role of major importance in the arbitration between the Government of Kuwait and Aminoil, was in the following terms:

The Sheikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alterations shall be made in the terms of this Agreement by either the Sheikh or the Company except in the event of the Sheikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this agreement.

In the light of modern practice, there were at least two striking deficiencies in the 1948 Concession Agreement. First, control of the amount of oil produced, and the price at which it was sold, were left with the company, the 'State within a State'. Secondly, there was no provision under which the Ruler could share in the profits of the venture, whether by taxation, by equity participation or by some other method. It is true that there were royalty payments: but these were to remain the same whatever increase there might be in the value of the product, since they were calculated at a fixed rate per English ton.

Such a surrender of control of a State's natural resources would be almost unthinkable now. However, it was still the pattern in the Arabian Gulf in 1948 (although, within a matter of years, the position changed as States reclaimed control of their natural resources, and the classic form of oil concession agreement went into sharp decline). Cattán, in his book *The Evolution of Oil Concessions in the Middle East and North Africa*, confirms that, for nearly half a century, the pattern had remained unbroken:

For almost fifty years [that is, until 1950] the general practice in the Middle East had been to stipulate a complete immunity of the oil concessionaire from taxation of every kind, present or future. . . . Some of the earlier concessions, particularly those made with the Sheikhs of the Arabian Gulf, were even silent upon the question of exemption from taxation, the reason being that taxes in those areas were virtually unknown.<sup>5</sup>

Indeed, so established was this practice, and so unlikely did it seem that there would be any change, that when Aminoil made a down-payment of US \$7.25 million to secure the 1948 Concession, the payment was regarded within the oil industry as being almost recklessly high. Longrigg described it as being 'the highest, beyond compare, in the Middle East at the time', resulting from an 'auction without fear or favour'; Anthony

<sup>5</sup> Cattán, *The Evolution of Oil Concessions in the Middle East and North Africa* (1967), at p. 43.

Sampson, more colloquially, described it as 'a spectacular bid . . . which horrified the majors'.<sup>6</sup>

*The revisions made in 1961 to the 1948 Agreement*

In legal theory, Aminoil might have sought to continue its operations in the divided zone throughout the life of the concession, without agreeing to any changes whatsoever—financial or otherwise—in the terms of the 1948 Concession Agreement. Article 17 of this Agreement stated that no alterations should be made in the terms of the Agreement 'by either the Sheikh or the Company' unless both agreed that such alterations were 'desirable in the interest of both parties'. Since there were to be no alterations in the Agreement without the consent of both parties, a refusal by Aminoil to give its consent could have kept the Agreement in its 1948 form.

It must be doubted, however, whether such a refusal by the company would have been prudent, given the changes which took place in the Middle East and elsewhere in the terms of oil concession agreements generally, from 1950 onwards. In December 1950 the Kingdom of Saudi Arabia entered into an equal profit-sharing agreement with its major concessionary company, the Arabian American Oil Company ('Aramco').<sup>7</sup> This was a move of major importance for the Saudi Government. It meant that henceforth, instead of relying upon fixed royalties or similar payments, the Government of Saudi Arabia would share equally with its concessionaire in the profits made from oil production. The State, in other words, became a partner with the company, sharing 'fifty-fifty' in the profits of the venture.

*The fifty-fifty principle*

The 'fifty-fifty principle', as it came to be called, spread quickly to neighbouring countries. In retrospect, it marked the beginning of the end of the classic oil concession agreement, since it brought the Arabian governments, for the first time, into profit-sharing partnership with their concessionaires.

At first, the effect of this change in relationships was masked. The adoption of the 'fifty-fifty principle' brought a considerable increase in revenue to the producer governments, without any corresponding decrease in the profits of the oil companies. This feat of magic was performed by the companies, who arranged for the payments they made to producer governments to be treated as 'tax payments' collected under 'tax decrees'. Since there was no tax legislation in the area, the requisite laws were prepared by the oil companies and their lawyers.<sup>8</sup> In this way, the

<sup>6</sup> Longrigg, *Oil in the Middle East* (3rd edn., 1968), at p. 215; Sampson, *The Seven Sisters* (1975).

<sup>7</sup> See Cattani, *op. cit.* above (p. 67 n. 5), at p. 44.

<sup>8</sup> Ballantyne, *Legal Development in Arabia* (1980), p. 74.

companies were able to offset the 'tax' paid to the producer governments against tax liabilities in their countries of origin. As one writer expressed it:

In a sense, therefore, the shift to 50:50 represented largely a transfer of tax revenue from the American and the British treasuries to those of the Middle East.<sup>9</sup>

Following the example of Saudi Arabia, Kuwait introduced its first 'Income Tax Decree' in 1951. It was, in effect, a tax upon KOC—the biggest and most important of the oil companies operating in Kuwait.<sup>10</sup> However, it was not until 19 July 1961 that agreements were made between Aminoil and Kuwait which provided that Aminoil would become subject to Kuwait's Income Tax Decrees—and so to the 'fifty-fifty principle'.<sup>11</sup> This in itself was a major evolution in the terms of the 1948 Concession Agreement. From paying royalties on a fixed basis of US \$2.50 per ton, Aminoil moved to a position in which, in effect, its profits were shared with the Government.

#### *Article 9—the so-called 'most-favoured nation' clause*

It was envisaged that further changes in the 1948 Concession Agreement might well be needed at some future time. To bring these about, the Government and the company wrote into the main 1961 Agreement a form of words which the oil world, borrowing inaccurately from public international law, called 'a most-favoured nation clause'.<sup>12</sup> This was Article 9. It was in the following terms:

If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and

<sup>9</sup> Hartshorn, *Politics and World Oil Economics* (1982), p. 180.

<sup>10</sup> KOC had first struck oil in 1938, in what became one of the world's biggest oilfields, the Burgan field; but the Second World War effectively prevented production, and it was not until 30 June 1946 that the first export of crude oil left Kuwait on board the *British Fusilier*. By 1950, KOC was producing almost 126 million barrels of crude oil, the whole of the State's production for that year.

<sup>11</sup> Aminoil struck oil in March 1953, when the no. 4 well at Wafra started flowing at the rate of 2,400 barrels per day. By 1961, Aminoil was producing just under 30 million barrels per day as contrasted with KOC's production of over 600 million barrels per day. (The figures come from information supplied to the Ministry of Oil, Kuwait.)

<sup>12</sup> At the time, two legal techniques were in common use in an effort to ensure that the terms of oil concession agreements altered as circumstances changed. There was, first, the 'review clause', which provided that at fixed periods of time the parties should review their arrangements with a view to change (but the difficulty here, of course, is that—as every lawyer knows—an obligation to negotiate is not an obligation to reach a concluded and binding agreement). Secondly, there was the 'most-favoured nation clause'. Under this type of clause, benefits accorded by an oil company to one country were to be automatically accorded by other oil companies to other countries. It was a game of 'leap-frog', but one in which all the governments who played were supposed to end up level. For a scholarly discourse on these legal techniques, see El-Kosheri, 'Le régime juridique dans le domaine pétrolier', *Recueil des cours*, 147 (1975-IV), pp. 285 ff.

taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the parties.

The clause was cautiously worded. It appears to have been a compromise between the Government (which no doubt would have liked a clause of automatic operation, so as to receive immediately any increased benefits being enjoyed by other governments in the area) and the company (which no doubt wished to retain some freedom of action, and so to 'consult' about whether or not there should be changes in the terms of the Concession Agreement).

The compromise worked for some years. Eventually, however, there was an important difference of opinion between the parties over whether or not the 'Abu Dhabi formula', which dramatically reduced the profits of the companies whilst increasing the 'take' of the producer governments, applied to the Concession Agreement. It was this difference of opinion which led, indirectly, to the arbitration.

### *Kuwait's independence*

For many years—indeed, since the original treaty of 1899—the Rulers of Kuwait had been in a special treaty relationship with the British Government. By virtue of this relationship, the British Government had assumed responsibility for the conduct of Kuwait's defence and foreign affairs. This special relationship was brought to an end, on friendly terms, on 19 June 1961;<sup>13</sup> and on 11 November 1962 the Constitution of Kuwait was promulgated, proclaiming that Kuwait was an Arab, independent and fully sovereign State; that no surrender of its sovereignty or of its territory would be permissible; and that the people of Kuwait were a part of the Arab nation. On 14 May 1963 Kuwait became a member of the United Nations.

The Aminoil concession continued, but with the Government taking the place of the Ruler.

### *The revisions made in 1973 to the 1948 Concession Agreement*

The final revisions to the original Concession Agreement were made in 1973, when a further agreement was drawn up between the Government and Aminoil. The payments due from Aminoil were increased. There were more stringent provisions governing oilfield practice. There was a stipulation to the effect that the 'Tehran Agreement', and the 'Geneva Agreements',<sup>14</sup> which were negotiated between representatives of the oil

<sup>13</sup> Exchange of Notes, *United Kingdom Treaty Series*, No. 93 (1961) (Cmd. 1518).

<sup>14</sup> The Tehran Agreement was made in February 1971, between six Gulf States and twenty-three oil companies. *Inter alia* the Agreement adjusted the posted price of the 'marker' crude. The Agreement was to have lasted for five years, but was amended by the Geneva I and Geneva II Agreements, made in January 1972 and June 1973 respectively. The effect of these Agreements was to increase the 'take' of the producer Governments.

companies and of the producer governments, should apply as if Aminoil had been a party to them; and that any subsequent modifications to these Agreements should also apply.

There was a new arbitration clause. There was also a new choice of law clause, which adopted the 'two-tier system' used elsewhere in the area<sup>15</sup> and subjected the 1973 Agreement to 'the principles common to the laws of Kuwait and of the State of New York, United States of America' and, in the absence of such common principles, to 'the principles of law normally recognized by civilized states in general including those which have been applied by international tribunals'. Finally, there was recognition of further possible changes in the original Concession Agreement in a provision to the effect that, in any future discussions about the concession, Aminoil 'should not be denied a reasonable opportunity of earning a reasonable rate of return (having regard to the risks involved) on the total capital employed in its business attributable to Kuwait'.

The 1973 Agreement was to have been signed and ratified by the Government and a new Tax Law was to have been introduced. In the event, this was not done. However, on 22 December 1973 Kuwait's Minister of Finance and Oil and representatives of Aminoil signed a letter in which the company agreed to make payments *as if* the 1973 Agreement was effective and *as if* the proposed Tax Law had come into force. For several years afterwards Aminoil made payments to the Government on this basis; but, in the arbitration, Aminoil questioned the validity and effect of the draft Agreement and of the letter of December 1973 (under which the sum of more than US \$32 million was then owing by Aminoil to the Government).

### OPEC

The driving force behind the movement for change in the terms of the classic oil concession agreement, which has led to the virtual extinction of such agreements in the Middle East, was the Organization of Petroleum Exporting Countries ('OPEC'). From its foundation in 1960,<sup>16</sup> OPEC worked to transfer power away from the major oil companies to the producing governments. In this endeavour OPEC was uniquely successful, moving from control of prices to control of production, and from equity 'participation' under the New York Agreement of 1972<sup>17</sup> to eventual full ownership of most of the oil companies operating in its member States.

The resolutions of OPEC, which closely affected the terms of trade between the oil companies and the producer governments, necessarily had

<sup>15</sup> See, e.g., the *Texaco* arbitration, cited at p. 81 n. 34, below.

<sup>16</sup> The founder members of OPEC were the Governments of Kuwait, Iran, Iraq, Saudi Arabia and Venezuela. Since 1960, Algeria, Ecuador, Gabon, Indonesia, Libya, Nigeria, Qatar and the United Arab Emirates have become members.

<sup>17</sup> For the text of the Agreement, also known as 'the Yamani Participation Agreement', see *Petroleum Intelligence Weekly*, 25 December 1972, Supp.

an impact upon the contractual relationship between Aminoil and the Government of Kuwait. In the arbitration, Aminoil contended that the resolutions of OPEC were not binding upon Aminoil, since it was not a party to them. For Aminoil, understandably enough, OPEC's resolutions were *res inter alios acta*. As a matter of strict law, the company's contention may have been correct (although changes in the terms of concessions generally, which were brought about as a result of OPEC's endeavours, should have been reflected in Aminoil's concession, under the terms of Article 9). From the political viewpoint, however, there was an unavoidable interaction between the three—OPEC, the Government and the company. This could be seen at its plainest in the events which led to the final crisis in the relations between the Government and the company—that is to say, the argument over 'the Abu Dhabi formula'.

### *The Abu Dhabi formula*

Following the war in the Middle East in October 1973, the price of oil increased dramatically—and as it increased, so did the profits of the oil companies. These profits were largely if not wholly 'windfall' profits, of the type which have been subjected to taxation by governments throughout the world.<sup>18</sup> They were due to the increased price of the product, rather than to any increased effort on the part of the producer. In November 1974, three Gulf States (not including Kuwait) met in Abu Dhabi and devised a formula to restrict these profits, which became known as the 'Abu Dhabi formula'. One month later, at its 42nd meeting (Vienna, 12 and 13 December 1974), OPEC announced that, in accordance with the decision taken at Abu Dhabi, the average government 'take' from the operating oil companies would be set at US \$10.12 per barrel on the 'marker' crude, with effect from 1 January 1975. This meant that the revenues left to the operating companies would be restricted to an average of 22 cents per barrel on the 'marker' crude.<sup>19</sup>

Aminoil feared that, as a marginal producer of heavy crude oil, it would be driven out of business by a strict application of the Abu Dhabi formula. The company asked for negotiations with the Government. Negotiations eventually took place, but the parties failed to reach agreement on the return which Aminoil should obtain on its investment in Kuwait. The negotiations then moved into a second phase, in which the possibility of an agreed 'take-over' of Aminoil was discussed between the parties. Again, however, no agreement was reached. Finally, the Government acted unilaterally. On 19 September 1977, by Decree Law No. 124, it enacted that Aminoil's concession should be terminated; that Aminoil's assets in Kuwait should revert to the State; and that 'fair' compensation should be paid to Aminoil.

<sup>18</sup> For instance, by the British and the Norwegian Governments, in respect of North Sea oil.

<sup>19</sup> See OPEC Information Department Press Release, no. 10-74 (Vienna, 13 December 1974); *Middle East Economic Survey*, vol. 18, no. 8 (13 December 1974).

*The reference to international arbitration*

Under the terms of the Decree Law, a Compensation Committee was established in Kuwait to assess the compensation payable. Aminoil, however, refused to take any part in the proceedings of the Compensation Committee and requested instead that there should be a reference to international arbitration, under the terms of the 1948 Concession Agreement. The Government refused to agree to this request, *inter alia* because it regarded the 1948 Concession Agreement as having been largely superseded by the revisions made in 1961 and again in 1973.

Aminoil then attempted to proceed unilaterally under the arbitration clause set out as Article 18 of the 1948 Concession Agreement ('the 1948 Arbitration clause') which provided that, in the event of a dispute, each party should nominate one arbitrator and that, if it failed to do so within sixty days, 'its arbitrator may at the request of the other party be designated by the British Political Resident in the Persian Gulf'. The arbitrators were then to appoint a 'referee'. If the arbitrators failed to agree upon a referee, then once again the appointment was to be made by 'the British Political Resident in the Persian Gulf'.

It is usual, in a properly drawn arbitration clause, to reserve to an independent third party the power to appoint an arbitrator, in case one or other of the parties to the dispute fails or refuses to do so. However—as will be seen—this particular reservation of power proved ineffective.

Acting under the 1948 Arbitration clause, Aminoil nominated the late Sir Gerald Fitzmaurice, GCMG, QC, a former judge of the International Court of Justice, as its arbitrator. The Government, however, refused to nominate an arbitrator under the 1948 Arbitration clause—and the result was a deadlock. Even if the 1948 Arbitration clause was the appropriate clause to use (and this the Government disputed), Aminoil was unable to ask for an arbitrator to be appointed on behalf of the Government. This was because the person to whom this power of appointment was reserved was the British Political Resident in the Gulf—and such a person no longer existed. For many years there had been a British Political Resident in the Gulf, based on Bahrain, but since 1971, as part of the withdrawal of British influence from the area, the office of British Political Resident had ceased to exist.

The deadlock could no doubt have been broken by an appointment under the revised Agreement of 1973. This Agreement contained a modern arbitration clause, which provided for a tribunal of three arbitrators (rather than the older-fashioned procedure of two arbitrators and a referee) and which reserved the power of appointment in default to the President of the International Court of Justice (rather than to the British Political Resident). The Agreement also contained a 'choice of law clause'. However, it did not suit Aminoil to proceed under the 1973 Agreement, since Aminoil took the view—which it argued vigorously in the arbitration—that this Agreement was devoid of legal effect.

After lengthy negotiations, it was eventually agreed that there should be a fresh Arbitration Agreement between the parties, under which 'all differences and disagreements between them' should be resolved 'on the basis of law' by an *ad hoc* arbitral tribunal of three members, sitting in Paris. This submission to arbitration was signed by both parties in Kuwait on 23 July 1979. The member of the tribunal appointed by the Government was a leading Egyptian lawyer, Professor Hamad Sultan; and the member appointed by Aminoil was, as before, Sir Gerald Fitzmaurice. The President of the arbitral tribunal was the distinguished French international lawyer, Professor Paul Reuter, who—on the application of both parties—was appointed by the President of the International Court of Justice.

As part of the submission to arbitration, it was recognized that 'the restoration of the parties to their respective positions prior to 20th September 1977 . . . would be impracticable in any event' and so all claims were limited to claims for monetary compensation or damages.

### *The importance of the arbitration*

The arbitration between the Government of Kuwait and Aminoil was important politically, because at the core of the dispute was one of the most difficult and politically sensitive problems of State contracts—the public right of a developing country to exercise sovereignty over its natural resources, set against the private rights of a foreign corporation under a concession agreement. The State was to contend that, during the thirty years which had passed since the concession had been granted, there had been major political, economic and social changes both within its own territory and in the world outside. These changes were reflected in developed public international law and, in particular, in those resolutions of the United Nations which concerned State sovereignty over natural resources and the New International Economic Order.<sup>20</sup> The company, in its turn, was to argue that it had paid a fair price for its concession and that, under the principle of *pacta sunt servanda*, the company should have been entitled to go on operating the oilfields until its contract to do so ran out, in the year 2008.

The arbitration was also important financially. There were large sums of money at stake. The Government, for instance, claimed that more than US \$32 million was owed to it by Aminoil under the financial provisions of the draft 1973 Agreement. It claimed that a further sum of more than US \$90 million was owed to it under the 'Abu Dhabi formula'. And it claimed that a sum of more than US \$18 million was owed to it, in respect of liabilities of the company assumed by the Government after nationalization. Each of these claims would rank as substantial before most national

<sup>20</sup> See, in particular, Resolution 1803 (XVII) (Declaration on Permanent Sovereignty over Natural Resources); Resolution 3201 (S-VI) (Declaration on the Establishment of a New International Economic Order); and Resolution 3281 (Charter of Economic Rights and Duties of States).

or international tribunals. They were dwarfed, however, by Aminoil's claim for repayment of more than US \$423 million paid under the terms of the draft 1973 Agreement, which the company now said should not have been paid, because the Agreement was ineffective; and by Aminoil's claim for profits lost, through the allegedly unlawful termination of its concession, in the amount of US \$2,587 million.

The arbitration was also important legally. Unlike the Libyan oil arbitrations,<sup>21</sup> which were also concerned with acts of nationalization, the arbitration between the Government of Kuwait and Aminoil was a properly contested arbitration—and most practising lawyers will know how frequently a judgment made in the absence of one party (for instance, on an application for an *ex parte* injunction) is modified, once the absent party has a chance to present its case. In the arbitration between the Government of Kuwait and Aminoil, both sides were represented. Both sides produced legal opinions from international jurists, called evidence from witnesses and argued the issues of law and fact at a hearing which lasted for six weeks.

Indeed, the hearing would have lasted much longer, but for the determination of the parties and of the tribunal to have the matters in issue resolved as expeditiously as possible. To achieve this aim—which is too frequently lost sight of in modern arbitral practice—meticulous pre-trial preparation is necessary. The tribunal played an active role in ensuring such preparation.

### *The preliminary procedural meetings*

The submission to arbitration—or Arbitration Agreement, as it was called—envisaged that there would be an early meeting between the parties and the tribunal to deal with procedural matters. In fact, two such meetings took place.

At the first of these, the arbitral tribunal established rules of procedure to supplement those already agreed between the parties. These rules, reflecting the fact that one of the parties was a State, drew more upon the established procedures for arbitrations between States than would be common in an arbitration conducted between private parties—or indeed, than would be common in an arbitration in which a State was involved, but which was conducted under the rules of one of the established arbitral institutions, such as the International Chamber of Commerce in Paris. For instance, a secretary was appointed to sit with the tribunal and to assist with the administration of the arbitration. Each party was represented by an agent, holding plenipotentiary powers.<sup>22</sup> In addition, in order to avoid

<sup>21</sup> The *Texaco* arbitration; the *Liamco* arbitration and the *BP* arbitration, cited at notes 34, 42 and 46 below.

<sup>22</sup> Dr A. Reda, Head of the Department of Legal Advice and Legislation of the Government of Kuwait, was appointed as the agent of his Government and was assisted by Counsellor Sayed Badr. Mr William Owen, a highly experienced oil company lawyer, was appointed as the agent of Aminoil. Professor P. Cahier, of the Institut Universitaire de Hautes Études Internationales de Genève, was appointed as secretary of the tribunal.

casting one party as the 'plaintiff' and the other as the 'defendant', it was decided that pleadings should be submitted by each side simultaneously and should consist of:

- (1) a memorial, containing a statement of the claims of each party, the basis of the claims and the relevant considerations in support;
- (2) a counter-memorial, containing the defence of each party to the claims made in the opposing party's memorial; and
- (3) a reply.

At the second procedural meeting, the tribunal acceded to a request from the Government that there should be separation of the issues of liability and quantum, with the latter being dealt with at a later stage. It was also agreed that the respective accountants for the parties should produce, if possible, a joint report on questions of quantum or, if this was not possible, then separate reports by a given date.<sup>23</sup>

In the Arbitration Agreement, both parties had undertaken to keep the oral hearing as short as possible, agreeing to refrain from calling witnesses where the presentation of documentary evidence would be equally satisfactory and expressing 'their intention that the oral hearings shall not be unduly prolonged'. This was a step in the direction of cutting down excessive and time-consuming debate, but it was given real effect by the tribunal following the second procedural meeting. In its most important contribution to a shortened hearing, the tribunal gave directions to the parties as to the points on which it particularly wished to hear them, and as to the order in which they should speak on these respective points. (It might perhaps be said, in passing, that if more arbitral tribunals were to familiarize themselves with the issues at an early stage and take charge of the proceedings in this way, the arbitral process would be much the better for it.)

The issues on which the Tribunal wished to hear oral evidence and argument included:

- (a) the system of law governing the arbitration;
- (b) the system of law applicable to the substantive issues in the case;
- (c) the obligation to negotiate, under a 'most-favoured nation' clause, and the application of the Abu Dhabi formula; and
- (d) the validity and effect of the Decree Law as a measure of nationalization, having regard to the 1948 Concession Agreement and its so-called 'stabilisation clauses'.

It is these issues, and the way in which the tribunal dealt with them, which will now be considered.

<sup>23</sup> In the event, both a joint report, on agreed items, and a separate report, on disputed items, were produced.

## II. THE ISSUES

(a) *The System of Law Governing the Arbitration*

The Arbitration Agreement made between the Government and the company in July 1979 described the proposed arbitration, which was to take place in Paris, as a 'transnational arbitration'. Aminoil contended that this (together with other factors) meant that the arbitration was 'de-localized'—that is to say, that the law governing the arbitration was not the law of France as the 'seat' of the arbitration, but an autonomous system of law. This autonomous system of law was described by Aminoil as 'the law, or rather the rules, established by the parties themselves or failing agreement, by the arbitral tribunal'; or as a system of law which governed all 'transnational arbitrations' and which was to be derived from international law.

*The 'de-localization' theory*

Aminoil was able to point out that, in recent years, the theory of 'de-localized' arbitration had gained considerable currency amongst writers<sup>24</sup> and, in some cases, had been put into practice by international arbitrators.<sup>25</sup> The theory, briefly stated, is that an international commercial arbitration must be regarded as being completely 'detached' from the law of the country in which it is held. This is said to be the case where the international arbitration is between private persons, and is so *a fortiori* where one of the parties to the arbitration is a State.

In recent years, it has become fashionable to seek to 'detach' international commercial arbitrations from the control of the law of the place in which they are held. Such 'detached' arbitrations go by many names. They may be called 'supra-national' or 'a-national' or 'transnational' or even 'ex-patriate'. They may be called 'de-nationalized' or 'de-localized'. More poetically, they are also referred to as 'floating' arbitrations, which result in 'floating awards'.<sup>26</sup>

Various reasons are advanced in support of the theory of detachment, or de-localization. The most compelling is the argument that, as a matter of principle, international commercial arbitrations *ought* not to be subject to legal controls which vary from country to country and which, in some countries, may be wholly unsuited to the modern practice of international commercial arbitration. In other words, the 'de-localization theory'

<sup>24</sup> The French literature is particularly rich on this topic. See, for instance, Fouchard, *L'Arbitrage commercial international* (1965), esp. at paras. 39–50 and 509–20; Goldman, 'Arbitrage (droit international privé)', *Répertoire Dalloz de droit international*, 1968, p. 128, no. 195; Derains, *Journal du droit international (Clunet)*, 106 (1979), pp. 991 ff.; and see also Paulsson, 'Arbitration Unbound', *International and Comparative Law Quarterly*, 30 (1981), p. 358, and 'Delocalisation of International Commercial Arbitrations: When and Why it Matters', *ibid.* 32 (1983), p. 53.

<sup>25</sup> See, e.g., the *Aramco* arbitration and the *Texaco* arbitration, cited at notes 32 and 34, below.

<sup>26</sup> For instance, Paulsson, referring to the controversy over such awards, after quoting Milton suggests that 'if international awards continue to float, their wings will henceforth hardly be those of silence': *International and Comparative Law Quarterly*, 32 (1983), p. 53.

reflects an understandable desire for modernity and uniformity in the regulation of international commercial arbitration. This does not mean, however, that the theory is necessarily right. Nor does it mean that the arguments which are used to support it are necessarily correct.

The theory appears to rely upon two basic arguments, which are frequently confused—not least by the exponents of the theory themselves.

The first argument is to the effect that the law of arbitration is merely a set of procedural rules and that, in an international commercial arbitration, these rules may be made by the parties themselves or by the arbitral tribunal on their behalf.<sup>27</sup>

The second argument is to the effect that any legal control of the arbitral process ought not to come from the country in which the arbitration is held—the so-called ‘seat’ of the arbitration—but from the country in which enforcement of the award is sought. This latter country would itself only refuse enforcement where there had been a breach of international public policy (*l'ordre public international*), of which the denial of a fair hearing would be an obvious example.

### *The arguments considered*

The first argument—that the law applicable to an arbitration is only concerned with rules of procedure and that the parties may formulate these for themselves—comes perilously close to an argument for an arbitration unsupported by law.

It is, of course, true that the parties to an international commercial arbitration will generally (although not always) have a ‘book’ of procedural rules, which will be those of one of the specialized arbitral institutions or those adopted by the parties themselves in an *ad hoc* agreement. It is true, too, that the arbitral tribunal will generally (but again, not always) have power to make good any gaps in these rules by giving appropriate directions. Finally, it is true that, in a sense, these rules may be said to constitute ‘the law of the parties’, in the same way as an agreement may be said to constitute ‘the law of the parties’. It would be wrong, however, to argue from this that there is no need for any ‘external’ law to govern the arbitration; and it would be wrong for two reasons.

First, as every lawyer knows, agreements that are intended to create legal rights and duties ‘cannot exist in a vacuum but must have a place within a legal system which is available for dealing with such questions as the validity, application and interpretation of contracts and, generally, for supplementing their express provisions’.<sup>28</sup>

<sup>27</sup> The current Rules of Arbitration of the International Chamber of Commerce in Paris (‘the ICC’) reflect this thinking. They provide, in Article 11, that: ‘The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.’

<sup>28</sup> McNair, ‘The General Principles of Law Recognized by Civilized Nations’, this *Year Book*, 33 (1957), p. 1 at p. 7.

Secondly, even if (for the sake of argument) it is conceded that the law of arbitration is only concerned with rules of procedure, these rules are much more than what might be called the 'internal rules' of procedure for the conduct of a particular arbitration—time-limits for the exchange of pleadings, rules for the disclosure of documents, pleadings, the method of presenting evidence and so on. There are rules of law which govern arbitral procedure externally, too. They are rules such as those which provide for the appointment of an arbitrator, where the parties cannot agree; or for the removal of an arbitrator who has failed in his duty of impartiality. They are rules which provide for the authority of the court to be given to orders which reach beyond the parties themselves—for instance, for the 'freezing' of a bank account or for the detention of goods.<sup>29</sup> Finally, they are rules which give legal authority and effect to the award, where the losing party is unwilling to honour the award voluntarily. Such rules must come from one or more systems of law. They cannot be made to depend upon the consent or agreement of the parties or upon the directions of the arbitral tribunal. On the contrary, such rules must be able to operate in the absence of consent, agreement or directions: otherwise, the arbitral process could be readily frustrated.

As to the second argument—that control of the arbitration should come solely from control of the award by the country in which enforcement is sought—the simple answer would seem to be that whilst this may represent a desirable position, it does not represent present reality.

The most important convention governing the recognition and enforcement of foreign arbitral awards is the New York Convention of 1958.<sup>30</sup> The system and text of this Convention is based, however, on the enforcement by one State of an award made in another State and carrying, so to speak, the 'nationality' of that other State. This can be seen with particular clarity in such provisions as that of Article V (1) (d) of the Convention, which provides that recognition and enforcement of an award may be refused if the 'composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, *was not in accordance with the law of the country where the arbitration took place*'<sup>31</sup> (emphasis added).

### *Origins of the de-localization theory*

Because of the importance of the de-localization theory in the field of international commercial arbitration, it is useful to look briefly at the development of the theory.

<sup>29</sup> The Rules of Arbitration of the ICC, for instance, provide that 'the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures . . .' (Article 8, Rule 5).

<sup>30</sup> This Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was signed at New York in June 1958, was made part of English law by the Arbitration Act 1975.

<sup>31</sup> This argument is put with particular effect by van den Berg in *The New York Arbitration Convention of 1958* (T. M. C. Asser Institute, The Hague, 1981).

It would seem that, in its origins, the theory owed much to the doctrine of State immunity. This certainly was the reasoning of the tribunal in the *Aramco* arbitration.<sup>32</sup> This arbitration, between the Kingdom of Saudi Arabia and the Arabian American Oil Company ('Aramco'), was held in Geneva, under an *ad hoc* arbitration agreement concluded in 1955. The arbitral tribunal consisted of three members. The President of the tribunal was Professor Sauser-Hall, member of the Permanent Court of Arbitration and of the Institute of International Law. He was chosen by agreement of the other two arbitrators, one of whom was appointed by each party. Professor Pierre Lalive was designated as Secretary-General of the tribunal.

Aramco held an oil concession agreement, granted by Saudi Arabia in 1933. In 1954 the Government of Saudi Arabia concluded an agreement with Mr Aristotle Onassis and his company, Saudi Arabian Maritime Tankers Ltd., under which the company was given a thirty years' 'right of priority' for the transport of Saudi Arabian oil. In brief, the point in issue in the arbitration was the conflict between this agreement and Aramco's concession agreement, which gave Aramco the exclusive right to transport the oil which it had extracted from its concession area in Saudi Arabia. The arbitral tribunal, by a majority, determined the case in favour of Aramco.

The arbitrators addressed the problem of what law was to govern the arbitration itself in the following terms:

The arbitration is to take place, in all cases, outside Saudi Arabia. It is obvious, therefore, that the law to be applied to this institution is not the law of Saudi Arabia, since the parties have intended from the very beginning to withdraw their disputes from the jurisdiction of local tribunals. This is an essential provision of their agreements, as the concessionaire wished to secure the guarantee of a neutral judge. Although the present arbitration was instituted, not between States, but between a State and a private American corporation, the Arbitral Tribunal is *not* of the opinion that the law of its seat should be applied to the arbitration. . . . *Considering the jurisdictional immunity of foreign States, recognised by international law in a spirit of respect for the essential dignity of sovereign power*, the Tribunal is unable to hold that arbitral proceedings to which a Sovereign State is a Party could be subject to the law of another State. . . . For these reasons, the Tribunal finds that the law of Geneva cannot be applied to the present arbitration. It follows that the arbitration, as such, can only be governed by international law. . . . In considering that the arbitration, as such, is governed by the law of Nations, the Arbitration Tribunal does not intend to apply this law to the merits of the dispute, *since the law governing the merits is independent of the law governing the arbitration itself*.<sup>33</sup>

The Aramco Award was delivered in 1958. Almost twenty years later, it was followed on this point by Professor Dupuy, the sole arbitrator in the dispute between *Texaco and the Government of Libya* ('the *Texaco*

<sup>32</sup> The *Aramco* award, 27 ILR at pp. 117 ff.

<sup>33</sup> *Ibid.*, at pp. 154-6 (emphasis added).

arbitration').<sup>34</sup> This arbitration—like the other Libyan oil arbitrations which are referred to later—arose out of the nationalization by the Libyan Government of oil concessions granted by Libya to various foreign companies.

In the *Texaco* arbitration, the concessions had been granted to the Texaco Overseas Petroleum Company and the California Asiatic Oil Company. The arbitrator, sitting in Geneva, considered carefully what system of law was applicable to the arbitration (and he made it clear, in this part of his award, that he was dealing with the law governing the *arbitration*, and not the law governing the substantive matters in dispute, which may be—and frequently is—a different system of law). He stated that, in determining this question, two solutions were theoretically possible. The first, adopted in the arbitration between *Sapphire International Petroleum Limited and N.I.O.C.*,<sup>35</sup> was to submit the arbitration itself to a given national law, which would generally but not necessarily be that of the place where it was held.<sup>36</sup> The second, adopted in the *Aramco* arbitration, was 'to consider this arbitration as being directly governed by international law'.<sup>37</sup>

It was this second solution which the arbitrator adopted in the *Texaco* arbitration, first because of the 'respect for sovereignty' argument and secondly—and here one sees the move to 'de-localization'—because 'if the parties intended from the outset to remove their differences from the jurisdiction of the local courts', the provision for the appointment of a sole arbitrator by the President of the International Court of Justice 'strengthens the presumption that the parties intended that any possible arbitration between them should be governed by international law'.<sup>38</sup>

On the face of it, this solution might appear to be both simple and sensible. According to the *Texaco* award, an international arbitration—as an institution—must be subject to a system of law, but not to any purely national system. Instead, it is subjected to 'international law'. It is 'international law' which controls the proper conduct of the arbitration and lends its authority to the recognition and enforcement of the eventual award, so long as this award does not infringe any requirement of international public policy (*ordre public international*).

The problem, however, is to find in 'international law' a complete code of law governing arbitrations involving a non-State party. What provisions are there in 'international law', for instance, for the appointment of arbitrators if the parties cannot agree and there is no mechanism in the

<sup>34</sup> The *Texaco* award, *International Legal Materials*, 17 (1978), p. 1; *Yearbook of Commercial Arbitration*, 4 (1979), p. 177; in the original French text in *Journal du droit international (Chunet)*, 104 (1977), pp. 350 ff., with a commentary by Maître J.-F. Lalive entitled 'Un grand arbitrage pétrolier entre un gouvernement et deux sociétés privées étrangères': *ibid.*, pp. 319 ff.

<sup>35</sup> The *Sapphire* award, *International and Comparative Law Quarterly*, 13 (1964), at p. 1011.

<sup>36</sup> The *Texaco* award, *International Legal Materials*, 17 (1978), at p. 7.

<sup>37</sup> *Ibid.*, p. 8 (at para. 13(b)).

<sup>38</sup> *Ibid.* (at para. 14).

arbitration agreement to deal with the position? What provisions are there in 'international law' about filling a vacancy on the arbitral tribunal if one should arise? Or for removing an arbitrator if he fails in his duty of impartiality, or in some other way?

There are, of course, international conventions on arbitration, such as the New York Convention, which has already been mentioned, but these conventions hardly constitute a complete code of law governing the arbitration itself, such as may be found in most national systems of law.<sup>39</sup> The arbitrator in the *Texaco* arbitration indicated that he could resolve any procedural inadequacies by his own direction, because the rules of procedure which he had adopted provided that, in so far as he was competent to do so, 'the Sole Arbitrator may modify and complete the present Rules of Procedure and, should the occasion arise, settle any questions of procedure not formally mentioned in the present Rules'.<sup>40</sup> The arbitrator added that, in adopting this provision, he had done no more than conform to general practice, as expressed in particular in the Rules of Arbitration and Conciliation for the Settlement of Disputes between two parties, only one of which is a State, prepared in 1962 by the Bureau of the Permanent Court of Arbitration; and in the draft Convention on Arbitral Procedure adopted by the United Nations in its Fifth Session in 1955.<sup>41</sup> However, this is an argument in a circle. Both the Rules and the draft Convention to which reference was made simply lay down rules of procedure and state that the arbitral tribunal may settle any procedural questions not covered by these rules. In other words, both the Rules and the draft Convention merely contain *procedural* rules and give the arbitral tribunal power to formulate other procedural rules if necessary. Neither the Rules nor the draft Convention purport to constitute a complete code of law governing international commercial arbitration as an institution. Moreover, even if they did so, they would only apply if the parties to the arbitration agreed to adopt them (which they did not) or if the parties were compelled to adopt them because they were mandatory (which they are not).

Despite the absence of any 'international law' governing arbitrations (other than arbitrations between States), a similar approach to that of the arbitrator in the *Texaco* arbitration was adopted by the sole arbitrator, Dr Sobhi Mahmassani, in another of the Libyan oil arbitrations, the *Liamco* arbitration.<sup>42</sup> Accordingly, it might be thought that the 'de-localization' theory is gaining acceptance in the practice of international arbitral tribunals. Certainly if, at its origins, the theory owed much to the doctrine

<sup>39</sup> The United Nations Commission on International Trade Law (UNCITRAL) is at present working on a Model Law, which is intended to provide an international code of law governing international commercial arbitrations. It would only operate, however, through adoption by sovereign States as part of their law.

<sup>40</sup> *International Legal Materials*, 17 (1978), at p. 9.

<sup>41</sup> *Ibid.*

<sup>42</sup> The *Liamco* award, *ibid.* 20 (1981), p. 1; *Yearbook of Commercial Arbitration*, 6 (1981), p. 89.

of State immunity, this is no longer the case. The theory is now said to apply to all international commercial arbitrations, irrespective of whether or not a State is a party.

In support of this view, it is pointed out—rightly—that the place in which an international commercial arbitration is held is often a matter of chance. The selection of a suitable venue by the parties, or by an arbitral institution, is generally guided by the desire to find a country which is ‘neutral’, in that it is not the home of either of the parties, and which is convenient, in that it is well served by modern communications. Mr Jan Paulsson, an experienced arbitration lawyer, has put the ‘geographical’ argument clearly, in a reference to the places of arbitration chosen by the International Chamber of Commerce (‘the ICC’). He has said:

The ICC Court does not select a place solely on the basis of its degree of confidence in the local legal system’s proven compatibility with the ICC Rules of Arbitration. Like the UNCITRAL Rules, the ICC Rules have been designed for international proceedings characterised by universality and adaptability.

Accordingly, the *situs* is chosen for its geographic appropriateness given the context of a particular case, with the respective domiciles of the parties being of central importance. Unless there are objective reasons to conclude that a *situs* is hostile to awards rendered in compliance with the Rules agreed between the parties, it is assumed that the whole world is a possible *situs*.

If this were not so, and if the international currency of awards depended ineluctably on their treatment in the hands of local magistrates in their countries of origin, the hopes for a more open and more universal system of international arbitration would be disappointed. Their attention riveted on the attitude of local magistrates, parties and arbitration institutions would have to give absolute priority to legal procedural considerations rather than to the factors of fairness, convenience, and neutrality. Institutions having the choice of selecting seats of arbitration would feel constrained never to venture beyond the tried and true.<sup>43</sup>

As has been said, the intention underlying the ‘de-localization theory’ is sensible enough. The idea is to free international commercial arbitration from the constraints of different national legal systems—to achieve, so to speak, a uniform system of international law governing international arbitrations. In this way, an international arbitral tribunal would not need to be concerned with the law of the place in which the arbitration was being held, because it would be free of such constraints. All that it would have to do would be to comply with the requirements of international public order—including, in particular, the requirement of a fair trial—so as to ensure the international acceptability of its award.

#### *Local law and the need for an effective award*

The problem is, of course, that an international arbitral tribunal will only be free of such constraints if the local law allows it to be so. Swiss law,

<sup>43</sup> *International and Comparative Law Quarterly*, 32 (1983), p. 53 at p. 55.

for instance, contains various mandatory provisions governing arbitration which, if breached, give grounds for an action for annulment of the award under the Swiss Concordat on Arbitration which applies to many Swiss cantons, including Geneva.<sup>44</sup> Nor is Switzerland by any means alone in this respect.

Parties who allow an arbitral tribunal to ignore a mandatory requirement of the local law run the risk of obtaining an award which can be set aside—both under the local law and in the country of enforcement under the New York Convention.<sup>45</sup> This recognition of the need for the *effectiveness* of an arbitration award was shown by Judge Lagergren, in another of the Libyan oil arbitrations, when he said:

The Tribunal cannot share the view that the application of municipal procedural law to an international arbitration like the present one would infringe upon such prerogatives as a State party to the proceedings may have by virtue of its sovereign status. Within the limits of international law, the judicial or executive authorities in each jurisdiction do, as a matter both of fact and of law, impose limitations on the sovereign immunity of other States within such jurisdictions. Clearly, in some legal systems the degree of control exercised by the courts over arbitral proceedings is greater than in others, and at times extensive. By providing for arbitration as an exclusive mechanism for resolving contractual disputes, the parties to an agreement, even if one of them is a State, must, however, be presumed to have intended to create an effective remedy. The effectiveness of an arbitral award that lacks nationality—which it may if the law of the arbitration is international law—generally is smaller than that of an award founded on the procedural law of a specific legal system and partaking of its nationality.<sup>46</sup>

As it happens, the lack of any effective applicable law did not matter, in either the *Aramco* arbitration or in the *Texaco* arbitration. Neither arbitral tribunal was concerned to conduct a proper arbitration, in the sense of one which would lead to an effective and enforceable award. In the *Aramco* arbitration, the tribunal stated:

It is appropriate to note that neither of the Parties claims damages for an alleged injury. The dispute is clearly limited to legal questions. . . . There is no objection whatever to parties limiting the scope of the arbitration agreement to the question of what exactly is their legal position. When the competence of the arbitrators is limited to such a statement of the law and does not allow them to impose the execution of an obligation on either of the parties, the Arbitration Tribunal can only give a declaratory award.<sup>47</sup>

In the *Texaco* arbitration, the arbitrator stated:

from a practical point of view, it is not unreasonable to think that an arbitration award connected with a national legal system may perhaps be easier to enforce. . . .

<sup>44</sup> For an English translation of the Swiss Intercantonal Arbitration Convention 1969, see Swiss Arbitration Association, *Concordat Suisse sur l'arbitrage* (Éditions Payot, Lausanne, 1974).

<sup>45</sup> See note 30, above.

<sup>46</sup> *BP v. Libya*, *Yearbook of Commercial Arbitration*, 5 (1980), p. 143 at p. 147. The case is also reported in 53 ILR 297.

<sup>47</sup> The *Aramco* award, 27 ILR at pp. 144 and 145.

But this is a consideration relating to enforcement, which is not within the jurisdiction of the Arbitrator. The plaintiffs have in fact stressed this point . . . and they have indicated that the present arbitration should be an arbitration on matters of principle. . . .<sup>48</sup>

It must be said that it is exceptional to find international commercial arbitrations in which what is sought is, in effect, a legal opinion. In the vast majority of such arbitrations what the parties are seeking, at the end of the day, is an effective and enforceable award. It is unlikely that they will obtain this if they allow the arbitration to be conducted in defiance of requirements of the local law, on the basis that it has no attachment to that law.

### *Establishment of the 'seat' theory in arbitral law and practice*

There is no doubt that the 'seat' theory is well established in international arbitral law and practice. It has influenced the wording of international conventions on arbitration from the Geneva Protocol on Arbitration Clauses of 1923 to the New York Convention of 1958. The Geneva Protocol proclaimed that 'the arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place'.<sup>49</sup> The New York Convention (which by Article VII (2) replaces the Geneva Protocol of 1923 and the Geneva Convention of 1927 to the extent that Contracting States become mutually bound by the New York Convention) maintains a reference to 'the law of the country where the arbitration took place'.<sup>50</sup>

The 'seat theory' has its own stalwart defenders.<sup>51</sup> Probably, in the light of modern practice, it is going too far to suggest that the law of the seat should govern not merely the arbitration as such but also, for instance, the validity of the agreement to refer to arbitration and the conflict rules to be applied by the tribunal, if it becomes necessary for the tribunal to determine the law governing the substantive issues in dispute. Nevertheless, at the present time, some link with the local law seems necessary to give efficacy to the proceedings and to the award. Indeed, Mr Paulsson, in the article quoted above,<sup>52</sup> appears to concede that he is arguing for the world as it ought to be—one in which there is a uniform system of law governing international arbitration—rather than for the world as it is. He takes care to say:

Having thus reaffirmed that arbitration may be detached from the law of the *situs*, I hasten to add that I doubt this feature of international arbitration has much

<sup>48</sup> The *Texaco* award, *International Legal Materials*, 17 (1978), at p. 8.

<sup>49</sup> See Article 2 of the Protocol.

<sup>50</sup> See, in particular, Article V (1) (d) of the New York Convention.

<sup>51</sup> See, for instance, Mann, 'State Contracts and International Arbitration', this *Year Book*, 42 (1967), p. 1 at p. 6; Park, 'The *lex loci arbitri* and International Commercial Arbitration', *International and Comparative Law Quarterly*, 32 (1983), pp. 21 ff.

<sup>52</sup> *International and Comparative Law Quarterly*, 32 (1983), at p. 53.

of an impact in practice. Competent Counsel will in all cases seek to have the process conform to local rules as a matter of prudence.<sup>53</sup>

### *The strength of the 'seat' theory*

The strength of the 'seat theory' is that an arbitral award takes its 'nationality' from the law of the country in which the arbitration took place, and so becomes enforceable as a foreign arbitral award under such international conventions as the New York Convention.

In the arbitration between the Government of Kuwait and Aminoil, it was this need for an *effective* award which was stressed by the Government, in support of its argument that the arbitration itself was governed by French law, whatever system of law might govern the substantive matters in dispute before the tribunal.

### *The tribunal's award*

In its award, the tribunal appears to have agreed with the argument put forward by the Government. However, it is not clear that the tribunal faced up to the question at issue as squarely as it might have done.

First, the tribunal failed to distinguish sufficiently between the *rules* of procedure—that is to say, the rules for exchanging pleadings, calling witnesses, exchanging experts' reports and so on—and the *law* governing the arbitral process as a whole. The tribunal states that 'the Parties themselves, in the Arbitration Agreement, provided the means of settling the essential procedural rules when they conferred on the Tribunal [this] power . . .'. This is, of course, correct. But the power of the tribunal to settle procedural rules was never in issue—indeed, many of the procedural rules were settled by the parties themselves, in advance of any ruling from the tribunal. What *was* in issue was whether the arbitration itself, as a judicial proceeding, was governed by French law as the law of the seat or whether it was 'de-localized'.

Secondly, the tribunal appears to have based its conclusion—that the arbitration *was* governed by any relevant mandatory provisions of French law—on the wishes of the parties themselves, rather than on the operation of an objective legal principle. In other words, the tribunal appears to have taken the view that the reason for the application of French law was consensual rather than territorial. Thus the tribunal states:

With regard to the law governing the arbitral procedure in the broadest sense, it is not open to doubt that *the Parties have chosen the French legal system* for everything that is implied in the statement in Article IV (1) of the Arbitration Agreement to the effect that the proceedings are subject to 'any mandatory provisions of the procedural law of the place where the arbitration is held' . . .<sup>54</sup>

So the impression which is left is that the arbitration proceedings were

<sup>53</sup> *International and Comparative Law Quarterly*, 32 (1983), at p. 57.

<sup>54</sup> Award, para. 3 (emphasis added).

governed by the wishes of the parties *and* by the law of France, rather than floating free of any national system of law; but that the law of France applied because the parties had chosen it, rather than because France was the place of arbitration. The end result is the same—but not, of course, the route by which it is reached.

(b) *The System of Law Applicable to the Substantive Issues in the Case*

The parties agreed that the differences between them should be resolved 'on the basis of law' (Arbitration Agreement of 23 July 1979). However, they did not agree what system of law was applicable. This problem was left to the tribunal which was told, in Article III (2) of the Arbitration Agreement, that:

The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world.

So the task of determining the applicable law was made fairly and squarely the responsibility of the tribunal, although in making its choice the tribunal was required to have regard to the matters specified in Article III (2). There were, of course, several different systems of law which the tribunal might have chosen, and the parties were not slow to put forward their preferences. Indeed, as the tribunal said, they 'furnished rival analyses and concepts which, on the scientific and academic levels, possess very great interest'.

*The Government's position*

The Government's position was reasonably straightforward. The Government suggested that, since its agreement with Aminoil was a State contract, the tribunal should follow the normal rule and apply the law of the State party to the contract.<sup>55</sup> The Government recognized, of course, that in suggesting that its own law should be applied to the substantive issues in dispute, it ran the risk of being accused of trying to close the circle against Aminoil, in the sense that, as a government, it could alter the

<sup>55</sup> It is not putting it too high to suggest that this is, indeed, the normal rule. The Permanent Court of International Justice considered there to be a presumption in favour of the law of the contracting State, in the cases of the *Serbian and Brazilian Loans*, *PCIJ*, Series A, Nos. 20/21 (1929). The House of Lords considered that, in seeking the proper law, 'great weight' (*per* Lord Atkin) or 'considerable weight' (*per* Lord Maugham) had to be attached to the fact that one of the contracting parties is a State: *R v. International Trustee for the Protection of Bondholders*, [1937] AC 500 at pp. 531 and 567, respectively. The French Cour de Cassation took a similar view in the *Messageries Maritimes* case: see Arrêt de la Cour de Cassation, Ch. Civ. 21 juin 1950, *Recueil Dalloz*, 1951, at p. 749. See also Jennings, 'State Contracts in International Law', this *Year Book*, 37 (1961), p. 156, and, for instance, Mann, 'Contrats entre États et personnes privées étrangères', *Revue belge de droit international*, 1975, p. 562 at p. 564.

proper law, so as to defeat Aminoil's claims. This is a well-known problem of State contracts. As Judge Sir Robert Jennings has expressed it:

The proper law of a State contract is normally the municipal law of the contracting State. In such a case, the contracting State may disappoint the expectations of an alien contractor in a number of ways. It may refuse to honour obligations owed even according to the local law. But the difficult case arises where the State has itself *changed* the local law; for since the contract is created in the local municipal law and subsists in that law, it follows that it may be terminated within that law.<sup>56</sup>

The Government also recognized—and this is perhaps another way of putting the same point—that in suggesting the choice of its own law, it might be said to be paying scant regard to the reference, in Article III (2), to 'the transnational character' of the relations between the parties and to the 'principles of law and practice prevailing in the modern world'. To meet this problem, the Government invited the tribunal to recognize that established public international law formed part of the law of Kuwait. This meant that the tribunal could apply Kuwait law, supplemented by such international legal principles and rules as were applicable to the 'transnational' aspects of the relationship between the parties. In this sense, the argument on behalf of Kuwait followed closely the terms of United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources which, referring to 'nationalization, expropriation, or requisitioning' by a State, stipulates that the owner should be paid 'appropriate compensation, in accordance with the *rules in force in the State* taking such measures in the exercise of its sovereignty *and in accordance with international law*' (emphasis added).<sup>57</sup>

Kuwait has a written Constitution and a modern code of law. This includes a Commercial Code first drafted in 1961 by an eminent Egyptian jurist, Dr Sanhoury. Indeed, much of the law of Kuwait—as of other States in the region—is derived from Egyptian law. No analogy was therefore possible between the law of Kuwait in the 1980s and—for example—the law of Abu Dhabi as it was some thirty years earlier when Lord Asquith, as sole arbitrator in the *Petroleum Development* case, said that he could not apply the law of Abu Dhabi since 'no such law can reasonably be said to exist'.<sup>58</sup>

Nor did the Government accept that the reference to the 'principles of law . . . prevailing in the modern world' (in Article III (2) of the Arbitration Agreement) meant that general principles alone should determine the rights and obligations of the parties. Many years ago, in this *Year Book*, Lord McNair, QC, put forward a proposal to the effect that certain types of long-term 'economic development agreements' to which a

<sup>56</sup> This *Year Book*, 37 (1961), at p. 156.

<sup>57</sup> This Resolution was adopted by the General Assembly in December 1962.

<sup>58</sup> *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi*, *International and Comparative Law Quarterly*, 1 (1952), p. 247 at p. 250.

State was a party should be governed by 'the general principles of law recognized by civilized nations' (taking these words from paragraph 1(c) of Article 38 of the Statute of the International Court of Justice).<sup>59</sup>

It would be wrong, however, to suggest that the 'general principles' constitute a system of law;<sup>60</sup> and in any event, Lord McNair made it clear that he was considering the case where 'the legal system of the country in which for the most part the contract is to be performed is not sufficiently modernized for the purpose of regulating this type of contract . . .'.<sup>61</sup>

In these circumstances, as has been indicated, the Government of Kuwait contended strongly that the governing law should be its own law, supplemented by such principles and rules of international law as were applicable to the 'transnational' aspects of its relationship with Aminoil.

### *Aminoil's position*

Aminoil, by contrast, contended that the contract between itself and the Government should be removed from the ambit of State law and 'internationalized'. The company pointed out that there was a 'choice of law' clause in the draft 1973 Agreement, which referred to principles common to the laws of Kuwait and of the State of New York and, in the absence of such principles, to the principles of law normally recognized by civilized States in general, including those applied by international tribunals.<sup>62</sup> The company argued that, although the draft Agreement had not been formally ratified, this showed that both parties were familiar with the concept of the 'general principles of law'; and that, by the provisions of Article III (2) of the Arbitration Agreement, the parties had intended to choose these general principles as a 'transnational law' which governed their relationship.

Judge Jessup, who helped to popularize the concept of 'transnational law' in his Storrs Lectures at the University of Yale, said that he would use the term to include 'all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.'<sup>63</sup>

It is easier, however, to talk about 'transnational law' than it is to define the content of such law. Aminoil sought to overcome this difficulty by suggesting that, for the purposes of the present case, transnational law could be regarded as equivalent to the general principles of law and that

<sup>59</sup> McNair, 'The General Principles of Law Recognized by Civilized Nations', this *Year Book*, 33 (1957), at pp. 1 ff.

<sup>60</sup> To this effect, see Mann, 'The Proper Law of Contracts Concluded by International Persons', *ibid.*, 35 (1959), p. 34 at p. 45.

<sup>61</sup> McNair, *loc. cit.* above (n. 59), at p. 19.

<sup>62</sup> The arbitral tribunal were in error in suggesting (at para. 6 of their award) that the parties did not refer to this text in the course of the arbitral proceedings. Both parties in fact referred to it; and Aminoil, as indicated, used the text in support of its argument in favour of transnational law.

<sup>63</sup> Jessup, *Transnational Law* (1956), p. 2.

amongst these general principles were five which were dispositive of the issues in the arbitration. The five principles thus selected were:

- (a) *pacta sunt servanda*;
- (b) reparation for injury;
- (c) respect for acquired rights;
- (d) the prohibition against unjust enrichment;
- (e) the requirement of good faith, including (i) the prohibition against abuse of rights and (ii) estoppel or preclusion.

Aminoil contended that the nationalization of its concession was a violation of these applicable principles and that it therefore constituted a breach of contract and an illegal act, for which the company was entitled to the monetary equivalent of *restitutio in integrum*.

There are striking parallels between the contentions put forward by Aminoil and the reasoning of Professor Dupuy, the sole arbitrator in the *Texaco* arbitration, which was one of the three Libyan oil arbitrations to which reference has already been made.<sup>64</sup> The facts which gave rise to the *Texaco* arbitration were as follows. The Government of Libya, in 1973 and 1974, promulgated decrees nationalizing all the rights, interests and property in Libya of Texaco Overseas Petroleum Company and California Asiatic Oil Company. The companies claimed that these nationalization decrees were in violation of the terms and conditions of their Deeds of Concession. The dispute was referred to arbitration by the companies, and in December 1974 the President of the International Court of Justice appointed Professor Dupuy, Professor of Law at the University of Nice, as sole arbitrator.

The Deeds of Concession contained a 'stabilisation clause', clause 16, which in its final version read as follows:

The Government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual consent of the parties. This Concession shall throughout the period of its validity be construed in accordance with the Petroleum Law and the Regulations in force on the date of execution of the agreement of amendment by which this paragraph (2) was incorporated into this concession agreement. Any amendment to or repeal of such Regulation shall not affect the contractual rights of the Company without its consent.<sup>65</sup>

The governing law clause of the Deeds of Concession, clause 28, was in the following terms:

This concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and in

<sup>64</sup> The citations which follow are from an English translation of the award authorized by the companies and published in *International Legal Materials*, 17 (1978), at pp. 1-37.

<sup>65</sup> It will be seen that this 'stabilization clause' was, if anything, less specific than that contained in Aminoil's 1948 Concession Agreement, since (unlike the latter) it contained no specific reference to legislation.

the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.<sup>66</sup>

The arbitrator considered first, in connection with the governing law, whether parties had the right to choose the system of law which was to govern their contract. His conclusion was that this was 'beyond any doubt: all legal systems, whatever they are, apply the principle of the autonomy of the will of the parties to international contracts'.<sup>67</sup> The arbitrator then went on to hold that the law which governed the contract was the 'two-tier system' provided for by the parties. This would seem fairly evident; and indeed, it would also seem that, on a plain reading of the text, this 'two-tier' system should have ensured that the governing law was the law of Libya, so long as the principles embodied in that law were common to the principles of international law. Only in the absence of such common principles should it have been necessary to refer to 'the general principles of law, including such of those principles as may have been applied by international tribunals'.

The arbitrator, however, seemed anxious to take the contract out of the context of municipal law. He said:

However, because it is a long time since the Permanent Court of International Justice delivered its judgments in the cases relating to the Serbian and Brazilian Loans, juridical analysis has been much refined in this field, in particular under the influence of contractual practice. This tends more and more to 'delocalise' the contract or, if one prefers, to sever its automatic connections to some municipal law: so much so that today, when the municipal law of a given State and particularly the municipal law of the contracting State, governs the contract, it is by virtue of the agreement between the parties and no longer by a privileged and so to speak mechanical application of the municipal law, as at a certain time was believed.<sup>68</sup>

The arbitrator then reversed the wording of the choice of law clause, which spoke of 'the principles of the law of Libya common to the principles of international law', and concluded that 'the reference which is made mainly to the principles of international law and, secondarily, to the general principles of law must have as a consequence *the application of international law to the legal relationship between the parties*' (emphasis added).<sup>69</sup>

The principle of international law which this exercise was designed to extract was the well-known principle that treaties are binding: *pacta sunt servanda*. Yet it is hardly necessary to refer to international law for such a

<sup>66</sup> The similarity of this clause to the clause in the draft 1973 Agreement between the Government of Kuwait and Aminoil will be noted.

<sup>67</sup> *Texaco award, International Legal Materials*, 17 (1978), p. 11, at para. 25.

<sup>68</sup> *Ibid.*, pp. 12-13, at para. 29.

<sup>69</sup> *Ibid.*, p. 15, at para. 41.

principle. The same general principle of the binding character of agreements exists equally in respect of contracts in municipal law. Indeed, as the arbitrator himself recognized, it exists as a firm principle of the law of Libya, 'whether we refer to the Sharia, the Sacred Law of Islam (a special reference should be made to Surah 5 of the Koran which begins with the verse: "O ye believers, perform your contracts") or to the Libyan Civil Code which includes on this point two basic articles illustrating the value which Libyan law attaches to the principle of the respect of the word given. . .'.<sup>70</sup> The real reason for the recourse to international law was to take the contract out of the reach of municipal law. As the arbitrator himself said:

The recourse to general principles is to be explained not only by the lack of adequate legislation in the State considered (which might have been the case, at one time, in certain oil Emirates). It is also justified by the need for the private contracting party to be protected against unilateral and abrupt modifications of the legislation in the contracting State: it plays, therefore, an important role in the contractual equilibrium intended by the parties.<sup>71</sup>

Exactly what this 'important role' was became clear when the arbitrator concluded that the 'undoubted right' of a State to nationalize 'cannot prevail over an internationalised contract, containing stabilisation clauses, entered into between a State and a foreign private company'.<sup>72</sup>

The *Texaco* award has run into sharp and, it is suggested, deserved criticism, particularly as it appears to elevate a State contract to the level of a treaty.<sup>73</sup> Its authority, as already suggested above, is weakened by the failure of the Libyan Government to take part in the proceedings. It is further weakened by the fact that each of the Libyan oil arbitrations produced different results: 'three arbitrations, the same problem, three different solutions', as Professor Stern has commented. Even if the *BP* arbitration is disregarded in this context, on the basis that the factual background was different, it seems fair to compare the *Texaco* award with the *Liamco* award, since the facts there were the same.<sup>74</sup>

Dr Mahmassani, the sole arbitrator in the *Liamco* arbitration, appears to have recognized in the 'choice of law' clause (as did Judge Lagergren in the *BP* arbitration) what one writer has called the 'sophistication of the clause'

<sup>70</sup> *Texaco* award, *International Legal Materials*, 17 (1978), pp. 18-19, at para. 51.

<sup>71</sup> *Ibid.*, p. 16, at para. 42.

<sup>72</sup> *Ibid.*, p. 25, at para. 73.

<sup>73</sup> See, in particular, Rigaux, 'Des dieux et des héros: réflexions sur une sentence arbitrale', *Revue critique de droit international privé*, 1978, pp. 16 ff.; Brigitte Stern, 'Trois arbitrages, un même problème, trois solutions', *Revue de l'arbitrage*, 1980, p. 1 at pp. 3 ff.; see also Brownlie's comment: 'A choice by the parties of public international law is assumed by some writers to place the contract on the international plane but this cannot be correct since a state contract is not a treaty and cannot involve state responsibility as an international obligation': *Principles of Public International Law* (3rd edn., 1979), at p. 551.

<sup>74</sup> For a recent clear and informed analysis of, and commentary upon, these awards, see Greenwood, 'State Contracts in International Law—The Libyan Oil Arbitrations', this *Year Book*, 53 (1982), pp. 27 ff.

in its 'subtle blending of Libyan law and international law . . .'.<sup>75</sup> Dr Mahmassani held that the Libyan act of nationalization would have been lawful if accompanied by 'equitable compensation', as required by international law. In this, of course, he differed from Professor Dupuy, who held that nationalization contrary to a 'stabilization' clause was illegal *per se*, regardless of the issue of compensation.<sup>76</sup>

### *The tribunal's award*

The tribunal, in the Kuwait arbitration, was not tempted to take the path of 'transnational law'. It preferred instead to look for a solution to the problem which faced it in the law of Kuwait, of which international law formed part. In doing so, it looked towards the general principles of law as helping to bring out 'the wealth and fertility of the set of legal rules that the Tribunal is called upon to apply' (award, para. 9). The tribunal's award, then, was much closer to that of Dr Mahmassani in *Liamco* than to that of Professor Dupuy in *Texaco*.

The tribunal also suggested that the future of a 'truly international economic order in the investment field' lay in taking advantage of the different legal elements involved and 'encouraging their trend towards unification' (award, para. 10).

The tribunal's decision on this point has been criticized, on the basis that

it was confused on this issue by saying that the law of Kuwait comprises international law which includes the general principles of law. In other words, the Tribunal applied a combination of three different laws: (1) the law of Kuwait; (2) international law; and (3) general principles of law. A combination which can hardly work and would produce conflicting results.<sup>77</sup>

It is difficult to understand the criticism. The tribunal's decision rests on traditional respect for the law of the State which is a party to the contract, yet takes account—through its express reference to public international law—of the protection which international law gives to the legitimate expectations of the foreign investor. The tribunal emphasized this approach in dealing with the question of compensation:

What the Tribunal does have to do—as was provided in the Arbitration Agreement and stressed by the Parties in the course of the proceedings—is to decide according to law, signifying here principally international law, which is also an integral part of the Law of Kuwait.<sup>78</sup>

<sup>75</sup> Robin White, 'Expropriation of Libyan Oil Concessions', *International and Comparative Law Quarterly*, 30 (1981), at p. 10. (The article deals with the first two published awards—the BP award and the *Texaco* award.)

<sup>76</sup> Greenwood, loc. cit. above (p. 92 n. 74), at p. 61.

<sup>77</sup> 'International News', *Oil and Gas Law and Taxation Review*, vol. 1, issue 6 (1982), at p. 213.

<sup>78</sup> Award, para. 142.

(c) *The Obligation to Negotiate, under the 'Most-Favoured Nation Clause', and the Application of the Abu Dhabi Formula*

The effect of the Abu Dhabi formula, which was adopted by OPEC at its meeting in Vienna in December 1974, was to put a limit on the profits of the operating companies. This new system, as the tribunal recognized,

had a revolutionary effect, not only on prices but on the very nature of the concession. It embodied the notion that the revenues left to the Companies would be pre-determined on a fixed (package) basis of 22 cents per barrel of the product of reference—'marker crude'—thereby transforming the concessions *de facto* into service contracts.<sup>79</sup>

The Abu Dhabi formula was adopted by the member governments of OPEC, by agreement amongst themselves; but in order to be effective, it then had to be introduced into the contractual relationships between individual governments and their individual concessionaires. The mechanism commonly used for bringing about this change in the contractual terms of the concessions was that of the so-called 'most-favoured nation clause'. As a distinguished Arab commentator has remarked:

In time, the concessions in the Middle East became almost identical in their principal terms in view of the 'most-favoured nation' clauses, whereby no country could acquire a valuable advantage not enjoyed by others.<sup>80</sup>

The 'most-favoured nation clause' in the 1961 Agreement between the Government of Kuwait and Aminoil has already been set out, but it would be convenient to repeat it here. It was Article 9 and it said:

If, as a result of changes in the terms of concessions now in existence or as a result of the terms of concessions granted hereafter, an increase in benefits to Governments in the Middle East should come generally to be received by them, the Company shall consult with the Ruler whether in the light of all relevant circumstances, including the conditions in which operations are carried out, and taking into account all payments made, any alterations in the terms of the agreements between the Ruler and the Company would be equitable to the Parties.

Aminoil and the Government embarked on negotiations concerning the application of the Abu Dhabi formula to Aminoil, but failed to reach a concluded agreement. The Government, as part of its case in the arbitration, asked the tribunal to apply the Abu Dhabi formula and to order Aminoil to pay the moneys due under it. This request raised several problems. First, an obligation to negotiate—such as that imposed by Article 9—is not an obligation to reach an agreement. Secondly, where parties have negotiated in good faith, but failed to reach an agreement, a tribunal cannot make that agreement for them (unless it is empowered to

<sup>79</sup> Award, para. 50.

<sup>80</sup> Mana Saeed Al-Otaiba, *OPEC and the Petroleum Industry* (1975).

do so either by the parties or by the applicable law). Thirdly, the Government had asked the tribunal to make an 'equitable assessment' of the amount due to it under the Abu Dhabi formula. Aminoil objected that the tribunal should make its decision in accordance with law, not equity; as one of Aminoil's counsel put it, succinctly:

... the Parties did not reach a mutual agreement as envisaged by Article 9. Since they did not do so, there was no amendment whatever to the terms between them which existed at the time. The current arrangements stood. Therefore, no payment of any kind, or in any amount, is due by Aminoil to the Government by means of their failure to agree on an equitable application of the Abu Dhabi terms or otherwise and that is very fundamental.<sup>81</sup>

The tribunal recognized the force of all these arguments. It stated:

The question here involved—one of those that are central to the present litigation—is a difficult one, known to all legal systems. An obligation to negotiate is not an obligation to agree. Yet the obligation to negotiate is not devoid of content, and when it exists within a well-defined juridical framework it can well involve fairly precise requirements.<sup>82</sup>

The tribunal concluded that, on the facts, the parties had fulfilled their obligation to negotiate:

A scrutiny of the negotiations fails to reveal any conduct on either side that would constitute a shortcoming in respect of Article 9 of the 1961 Supplemental Agreement, or of the general principles that ought to be observed in carrying out an obligation to negotiate—that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise. The Tribunal here makes reference in particular to the well known *dicta* in the *North Sea Continental Shelf* and *Lac de Lanoux* cases.<sup>83</sup>

The tribunal also agreed that it could not make a new contract for the parties. It said:

... there can be no doubt that, speaking generally, a Tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations—or to modify a contract—unless that right is conferred upon it by law, or by the express consent of the parties. The law does often give a Tribunal this right, and precedents in many countries could be cited in which, on the basis of the applicable law, courts have completed a contract. But arbitral tribunals cannot allow themselves to forget that their powers are restricted. It is not open to doubt that an arbitral tribunal—constituted on the basis of a 'compromissory' clause contained in relevant agreements between the parties to the case, and seized in the matter unilaterally by one of the parties only—could not, by way of modifying or completing a contract, prescribe how a provision such as the Abu Dhabi Formula must be applied. For that, the consent of both parties would be necessary.<sup>84</sup>

<sup>81</sup> Award, para. 72.

<sup>83</sup> Ibid., para. 70(i).

<sup>82</sup> Ibid., para. 24.

<sup>84</sup> Ibid., para. 74.

The tribunal then went on to say, however, that, in the present case, it was *not* being asked to make a new contract. Both sides had agreed that *something* was due under the Abu Dhabi formula, but they had failed to agree how much. The tribunal held that, within the framework of a general settlement of the disputes between the parties, the arbitrators had jurisdiction to determine the amounts due by an application of the Abu Dhabi formula and that, in doing this, it was 'not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles'.<sup>85</sup> On this basis, the tribunal assessed a sum of just over US \$70 million as being due from Aminoil to the Government under the Abu Dhabi formula.

Sir Gerald Fitzmaurice contributed an interesting rider to the tribunal's decision on this point. He indicated that he might well have regarded the failure of the parties to agree as being the end of the matter, but he then added:

Such was the strictly legal position I believe. Nevertheless, in the particular circumstances of this case, I find it very hard (although some of the reasoning might not have been mine) to dissent from the conclusion reached in the Award, which is based on the view that, the principle of *something* being due on Abu Dhabi account having been conceded—which could of course only take the form of increased payments to the Government, and correspondingly diminished profits for Aminoil (though these must not fall below a 'reasonable rate of return')—the Tribunal was competent to assess what these payments ought to be, on the basis of what, in the words of Article 9, 'would be equitable to the Parties', taking account of the various factors specified in the Article; and given that this course had been requested by one of them and, after an initial objection, and some hesitations, more or less tacitly accepted by the other.<sup>86</sup>

(d) *The Validity and Effect of Decree Law Number 124 of 1977, having regard to the so-called 'Stabilization Clauses'*

For both parties, the crucial issue in the arbitration between the Government of Kuwait and Aminoil was whether or not Decree Law No. 124 of 1977 was a valid act of nationalization. The Government contended that it was. Aminoil did not agree. For Aminoil, the Decree Law was a breach of the Government's contractual obligations; it was also (the company argued) an illegal act, since it was not made for a bona fide public purpose, was discriminatory and offended the general principles of law relied upon by Aminoil as constituting 'transnational law'.

The tribunal's concern was to decide whether or not the nationalization was valid in public international law. It dealt first with the conflicting arguments as to 'bona fide public purpose' and 'discrimination' which were put forward; it then turned to consider the 'contractual argument'

<sup>85</sup> The quotation is from the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases, cited with approval in the award, at para. 78.

<sup>86</sup> Separate opinion, para. 15.

based on the stabilization clauses in the Concession Agreement—and on this point it was divided.

### *Public purpose*

On the argument as to ‘public purpose’, the tribunal said:

In regard to Decree Law No. 124, it has been objected that by reason of its specific character, it took the form of a single measure not directed to any object of general interest. This contention does not seem to be well founded. It is generally known that all Middle Eastern States belonging to OPEC (as well as other producing countries) have always considered that their overall petroleum policy must, in its final phases, result in the nationalization of the whole local petroleum industry, and it is the fact that the entity operating much the most important concession in the land (the Kuwait Oil Company)—after having been made the object of a 60% participation in its share capital by the Government—was subjected very soon afterwards, and before Decree Law No. 124, to a total nationalization. In short, after having nationalized over 90% of petroleum production in its territory, the Kuwait Government, now in possession of staff and plant already *in situ*, was able without difficulty to nationalize Aminoil’s much less important undertaking.<sup>87</sup>

The tribunal went on to state that a government which was pursuing a coherent policy of nationalization was entitled to do so progressively. ‘It is hardly necessary’, the tribunal said, ‘to stress the reasonable character of a policy of nationalization operating gradually by successive stages, in step with the development of the necessary administrative and technical availabilities’.<sup>88</sup>

### *Discrimination*

The tribunal next dealt with the suggestion that the act of nationalization was ‘tainted with discrimination’ because the Arabian Oil Company (‘AOC’)—which operated offshore in both sectors of the divided zone under a concession granted jointly by the Governments of Kuwait and Saudi Arabia—had not been nationalized under the Decree Law. The tribunal rejected out of hand any suggestion of discrimination. It said:

First of all, it has never for a single moment been suggested that it was because of the American nationality of the Company that the Decree Law was applied to Aminoil’s Concession. Next, and above all, there were adequate reasons for not nationalizing Arabian Oil. At the press conference mentioned above, the Minister for Oil had touched upon this question and had given the following reasons for the non-nationalization of AOC—which there is no difficulty in finding convincing:

‘AOC’s high-cost off-shore production operations are such as to give it a special position which requires a high degree of expertise. At the same time, it is working within the framework of a concession granted by both Kuwait and Saudi Arabia, so its position is completely different. Any modification of the concession must be agreed to by both countries’.<sup>89</sup>

<sup>87</sup> Award, para. 85.

<sup>88</sup> Ibid., para. 86.

<sup>89</sup> Ibid., para 87.

Accordingly, the tribunal held that there was nothing that would *prima facie* prevent recognition of the validity of the nationalization.<sup>90</sup>

*The so-called 'stabilization clauses'*

This finding was subject, however, to the argument over the stabilization clauses in the Concession Agreement. The principal 'stabilization clause' was Article 17 in the 1948 Concession Agreement, which read as follows:

The Sheikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either the Sheikh or the Company except in the event of the Sheikh and the Company jointly agreeing that it is desirable in the interest of both parties to make certain alterations, deletions or additions to this Agreement.

The purpose of a 'stabilization clause' is to prevent the State party to a contract using its sovereign powers in such a way as to alter the contractual regime, without the agreement of the private party. The clause is intended, as it were, to reinforce the provisions of the contract and to give some added security to the private party, as a counterpoise to the sovereign power of the State.

The origin of the stabilization clause—Article 17—in the 1948 Concession Agreement may be traced directly back to the Concession Agreement made in 1934 between the Ruler of Kuwait and the Kuwait Oil Company, one of the owners of which was the Anglo-Persian Oil Company, as it was then known. Early drafts of this Concession Agreement contained no stabilization clause. However, events across the Gulf, in Persia as it then was, appear to have been responsible for a change in this state of affairs.

In November 1932 the Shah of Persia declared his unilateral annulment of the oil concession in Persia which had been granted in 1901 to the Anglo-Persian Oil Company. The resulting dispute was referred in December 1932 by the Persian and British Governments to the Council of the League of Nations in Geneva and following this reference, and after hard negotiations, a new concession agreement was drawn up between the Persian Government and the Anglo-Persian Oil Company.<sup>91</sup> It is probably no coincidence that, following this experience, the revised draft concession agreement which was put forward by the Anglo-Persian Oil Company to the Ruler of Kuwait in January 1934 contained a clause

<sup>90</sup> In his separate opinion, Sir Gerald Fitzmaurice appears to indicate that he might have been inclined to consider the nationalization as discriminatory. He says: 'In addition, in the present case, a clearly discriminatory element enters in, inasmuch as the parallel nationalization of the Kuwait Oil Company ("KOC") was carried out in agreement with that company, on terms consented to by it. No such option was offered to Aminoil' (separate opinion, footnote 8). But Sir Gerald was wrong in saying that 'No such option was offered to Aminoil'. As the award itself recites in the factual section, Aminoil put forward in June 1977 a proposal under which it would have been taken over by the Government; and the Council of Ministers of Kuwait endorsed the principle of such a takeover. However (contrary to what had happened with KOC), it proved impossible to reach agreement upon the compensation payable.

<sup>91</sup> Chisholm, *The First Kuwait Oil Concession* (1975).

directed against any annulment of the concession. This clause provided in terms that the Sheikh should not 'by general or special legislation or by administrative measures or by any other act whatever annul . . .' the agreement. Chisholm, in his book *The First Kuwait Oil Concession*, does not record any negotiations or discussions about this clause; however, no objection appears to have been raised to it, since the final version of the concession granted in December 1934 to the Kuwait Oil Company contained, in Article 17, a stabilization clause in exactly the same terms as that later reproduced, also as Article 17, in the 1948 Concession Agreement between the Ruler of Kuwait and Aminoil.

In his separate opinion in the arbitration between the Government of Kuwait and Aminoil, Sir Gerald Fitzmaurice provided an interesting footnote on the origin of stabilization clauses. He said:

By what historical process did provisions such as Article 17 come to be inserted in agreements between States and foreign commercial or industrial entities? In contracts between private parties they would have been thought quite superfluous. If the contract provided that it was made for a certain period, then it would follow automatically that it could not be terminated unilaterally by either party during, or before the end of, that period, except for reasons specifically provided for elsewhere in the contract. To 'spell-out' all this at length would have been thought exaggerated and really somewhat invidious. Again, even in contracts between States and foreign corporate entities, the same view would normally have been taken at any time up to about the date of the First World War. But between the two Wars things began to change. Particularly in Latin-America, there were increasing cases in which the local government, having granted a concession to a foreign corporate entity for the construction and running of railways, tramways etc., or to extract and process mineral products, would wait until the undertaking had got past its 'teething' troubles and had become a 'going concern', and would then step in and take it over. The appellation of 'nationalization' was not then much in vogue, but the effect was the same, namely that the State compulsorily acquired the undertaking, either itself to operate it, or to hand it over to a corporation of local nationality.

It was specifically in the light of those occurrences that stabilization clauses began to be introduced into concessionary contracts, particularly by American Companies in view of their Latin-American experiences, and for the express purpose of ensuring that Concessions would run their full term, except where the case was one for which the Concession itself gave a right of earlier termination.<sup>92</sup>

Amongst the commentators there are sharp differences of opinion as to whether or not a State may, by private contract, renounce a fundamental right of its statehood, such as the right to nationalize private property for a bona fide public purpose.

Some writers suggest that a State which has agreed in this way not to exercise its right of nationalization must be held to its contract no matter what change in circumstances may have taken place since that contract was

<sup>92</sup> Separate opinion, footnote 7.

made, and no matter for how long the agreement not to nationalize may run.<sup>93</sup> The argument is that, by agreeing to insert a stabilization clause in its contract, the State has aroused the 'legitimate expectations' of the private investor and must keep to its written word, as a matter of good faith. To the suggestion that a State cannot restrict its sovereignty by a contractual renunciation of its right to nationalize, it is retorted that such a renunciation is *not* a restriction on State sovereignty, but an affirmation of that very sovereignty—an exercise of the State's power, to which effect must be given if the power of the State to enter into contracts is not to be denied.

On rather less exposed ground stand those commentators who suggest that a State may by contract renounce its right to nationalize but only 'for a limited number of years'.<sup>94</sup> There would seem to be much sense in this proposition. A company which, for example, is proposing to commit substantial financial and technical resources in seeking and, if successful, exploiting mineral resources needs some assurance that, at the very least, it will be able to recoup its investment, together with a reasonable return on that investment. A guarantee against nationalization for a 'limited number of years' would be one way of giving such an assurance. Yet it would seem that the 'limited period' which is stipulated should be measured against the projected life of the mineral resources and should be less than this projected life; otherwise, it would be unrealistic to regard the stipulation as having been made 'for a limited period'.

Finally, there are commentators who assert that a State is free to nationalize, notwithstanding an express undertaking not to do so; and who suggest that, in these circumstances, a stabilization clause will at best give a special right to compensation.<sup>95</sup> Their reasoning is simple and, it is suggested, persuasive. It is that a State cannot by a simple contract—as opposed to a treaty—renounce the public responsibilities which it has and which imply the right to change its policies if circumstances—that is to say, the public interest—so require. As one North American judge has put it, 'no person has a vested right in any general rule of law or policy of legislation entitling him to insist that it shall remain unchanged for his benefit'. Or, as another such judge has put it, 'the United States when sued as a contractor cannot be held liable for an obstruction to the performance of a particular contract resulting from its public and general acts as a sovereign'.<sup>96</sup>

<sup>93</sup> For a recent, clear and concise review of the law on stabilization clauses, see J.-F. Lalive, 'Contrats entre Etats et personnes privées', *Recueil des cours*, 181 (1983-III), pp. 56 ff.; see also Weil, 'Les clauses de stabilisation ou d'intangibilité dans les accords de développement économique', in *La communauté internationale. Mélanges offerts à C. Rousseau* (1974), p. 301. For a more recent view by the same author, of the apparent turn of the tide in favour of the State party to a contract, see *Mélanges offerts à Paul Reuter: le droit international—unité et diversité* (1981), at pp. 551 ff.

<sup>94</sup> See, for instance, White, *Nationalisation of Foreign Property* (1961), p. 178.

<sup>95</sup> See, for instance, Aréchaga, 'International Law in the Past Third of a Century', *Recueil des cours*, 159 (1978-I), pp. 307-9.

<sup>96</sup> Cited in Mann, 'State Contracts and State Responsibility', *American Journal of International Law*, 54 (1960), at p. 584.

In international arbitral practice there is an equally sharp division of opinion as to the effectiveness of stabilization clauses, as may be seen simply by looking at the Libyan oil arbitrations. In *Texaco*, the sole arbitrator held that what he called 'the undoubted right of a State to nationalize' could not prevail over the stabilization clause in the contract between the State and the private company. In *Liamco*, on the other hand, where the stabilization clause was in exactly the same terms, the sole arbitrator held that the act of nationalization would be lawful if accompanied by equitable compensation.

In the arbitration between the Government of Kuwait and Aminoil, the company—as might be expected—placed heavy reliance on the stabilization clauses in the Concession Agreements and, in particular, on Article 17 of the 1948 Concession Agreement. Aminoil argued that the effect of these clauses was to prevent the exercise by the Government of its otherwise undoubted right to nationalize. It added that, by bringing in the Decree Law, the Government had committed a breach of its contract and of the applicable law and so exposed itself to a liability to pay damages equivalent in money terms to the complete restitution of the previous concessionary regime.<sup>97</sup> Aminoil argued that the principle of *pacta sunt servanda* was a fundamental principle of law, which was constantly being proclaimed by international courts and tribunals; and that a State could not lawfully abrogate a contract with a foreign party where it had expressly agreed not to do so. In support of its argument, the company relied on extensive citations from writers and jurists, as well as on decisions such as those of the arbitral tribunal in *Radio Corporation of America v. China*,<sup>98</sup> and that of the sole arbitrator in the *Texaco* arbitration. In many ways, the argument put forward by Aminoil echoed the contentions put before the International Court of Justice by the United Kingdom in the *Anglo-Iranian Oil Company* case (where, as is well known, no decision on the substantive issues was given since the Court declined jurisdiction).<sup>99</sup>

The Government of Kuwait, for its part, argued that Article 17 was a 'colonial-type' of stabilization clause, which could hardly be expected to survive the radical changes which had taken place since it had been drawn up—including the declared independence of Kuwait and the promulgation of a new constitution for the State, not to speak of major revisions to the Concession Agreement itself. The Government also argued that,

<sup>97</sup> It will be recalled that, in the Arbitration Agreement, the parties had sensibly agreed that restitution of the concession would be impracticable and that, accordingly, all claims would be limited to claims for monetary compensation or damages.

<sup>98</sup> *Reports of International Arbitral Awards*, vol. 3, p. 1623.

<sup>99</sup> In the *Anglo-Iranian Oil Company* case (*Pleadings*, pp. 86–93), the memorial of the United Kingdom Government stated, *inter alia*: 'Article 21 of the Convention lays down that "the Concession shall not be annulled by the Government and the terms therein contained shall not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities"'. That Article of the Convention was inserted with the specific object of making it legally impossible for the Government of Iran to put an end to the concession by some such measure of nationalisation.'

whilst it might be that a State could restrict its future legislative freedom for a limited number of years, it could not be held to have done so for the whole life of the concession. In effect, the Government urged the tribunal to regard the stabilization clauses as having spent whatever force they may once have had; and it suggested that for the tribunal to come to any other conclusion would be against the whole tenor of modern international law, as reflected particularly in United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources.

At first glance, the tribunal was not moved by these arguments. It rejected the 'colonial' argument, on the basis that the 1948 Concession Agreement had been confirmed in 1961, immediately following Kuwait's termination of its special relationship with the United Kingdom.<sup>100</sup> The tribunal also stated that there was no positive rule of public international law, whether reflected in resolutions of the United Nations or otherwise, which would prevent a State from pledging itself *not* to nationalize particular foreign undertakings.

However, the majority of the arbitrators then introduced an important qualification to this general proposition by indicating that such a pledge, to be valid, would have to be for a limited period only. They said:

... it would not be possible ... to deduce the existence of a rule of international law prohibiting a State from undertaking not to proceed to a nationalisation *during a limited period of time*.<sup>101</sup>

If, then, a State could validly enter into an agreement *not* to nationalize during a limited period of time, had Kuwait done so by the terms of its Concession Agreement with Aminoil—and, in particular, by the 'stabilisation' clauses in that agreement? And if it had done so, for how long was this limited period to run, given that the concession had already been in existence for almost thirty years at the time of the act of nationalization; and given, too, the fact that, on the expert evidence, the oil reserves were likely to be economically exhausted by the time the concession came to a natural end after a further thirty years?

These questions are important questions on which—as has been shown—learned opinion is divided. It would have been of great interest to know what answers the tribunal would have given—and in particular, perhaps, how they would have defined a 'limited period of time'. The tribunal decided, however—perhaps wisely—to proceed with discretion, rather than with valour. The majority—Professor Reuter and Professor Sultan—conceded that the stabilization clauses *could* be read as a prohibition against nationalization, but made it clear that they were not prepared to read them in such a way. 'That is', they said, 'a possible

<sup>100</sup> This was an uncompromising view for the tribunal to take, since it assumes that a nation becomes 'independent' overnight in fact as well as in theory.

<sup>101</sup> Award, para. 90 (2) (emphasis added).

interpretation on the purely formal plane; but, for the following reasons, it is not the one adopted by the Tribunal' (award, para. 94).

The majority of the arbitrators then gave three reasons for their decision not to regard the stabilization clauses as a prohibition on nationalization. First, they said that any limitation on a State's right to nationalize 'would be a particularly serious undertaking which would have to be expressly stipulated for'. Secondly, they repeated that it would be expected to 'cover only a relatively limited period'. Thirdly, they considered that there had been a 'metamorphosis in the whole character of the concession' as a result of changes brought about 'through the play of Article 9, or else as a result of at least tacit acceptances by the Company, which entered neither objections nor reservations in respect of them' (award, paras. 95 and 97).

It was this last reason—the 'metamorphosis in the whole character of the concession'—which seemed to carry the most weight with the majority of the tribunal.<sup>102</sup> They said in terms:

This Concession—in its origin a mining concession granted by a State whose institutions were still incomplete and directed to narrow patrimonial ends—became one of the essential instruments in the economic and social progress of a national community in full process of development. This transformation, progressively achieved, took place at first by means of successive increases in the financial levies going to the State, and then through the growing influence of the State in the economic and technical management of the undertaking, particularly as to the control of pricing policy, taken over in 1973, and the regulation of works and investment programmes. The contract of Concession thus changed its character and became one of those contracts in regard to which, in most legal systems, the State, while remaining bound to respect the contractual equilibrium, enjoys special advantages. . . .

The faculty of nationalizing the Concession could not thenceforward be excluded in relation to the regime of the undertaking as it resulted from the sum total of the considerations relevant to its functioning. This conclusion concerning the interpretation of the stabilization clauses, as being no longer possessed of their former absolute character, which the Tribunal has thus reached, is in harmony with that regime as it stood in 1977—and a contrary interpretation would, in addition, disregard its other contractual components.<sup>103</sup>

The majority of the tribunal thus showed concern for what might be called the 'balance' of the Concession Agreement. They recognized that times had changed since the making of the original Agreement in 1948; and they recognized that they would be out of touch with these changes, which were reflected in changes to the Concession Agreement itself, if they construed the Agreement, or the 'stabilization' clauses it contained, as an absolute prohibition against nationalization.

<sup>102</sup> Sir Gerald Fitzmaurice, in his separate opinion, conceded that the argument that the character of the Concession Agreement had changed was 'arguable, and not without plausibility' (separate opinion, para. 22).

<sup>103</sup> Award, paras. 98 and 100.

For the majority of the tribunal, the 'stabilization' clauses in the Concession Agreement were directed against 'anything which, by reason of its confiscatory character, might cause serious financial prejudice to the interests of the Company' (award, para. 93); and, whilst these clauses could not be interpreted as absolutely forbidding nationalization, they had not lost all their value and efficacy on that account since 'by impliedly requiring that nationalization shall not have any confiscatory character, they re-inforce the necessity for a proper indemnification as a condition of it' (award, para. 96).

Sir Gerald Fitzmaurice, in his powerful and well-argued separate opinion, showed his dislike for nationalization. He said:

It is an illusion to suppose that monetary compensation alone, even on a generous scale, necessarily removes the confiscatory element from a take-over, whether called nationalization or something else. It is like paying compensation to a man who has lost his leg. Unfortunately, it does not restore the leg.<sup>104</sup>

Sir Gerald indicated that, in his view the stabilization clauses—and particularly Article 17—were not to be confined to the case of confiscatory measures only, but were concerned with 'any measure terminating the Concession before its time' (separate opinion, para. 24). On this basis, Sir Gerald concluded:

In consequence, and while I naturally hesitate to differ from a view so skilfully constructed and persuasive as that contained in the Award, good faith and my professional conscience compel me to conclude that although the nationalization of Aminoil's undertaking may otherwise have been perfectly lawful, considered simply in its aspect of being an act of the State, it was nevertheless irreconcilable with the stabilization clauses of a Concession that was still in force at the moment of the take-over.<sup>105</sup>

The passage quoted makes it clear that, if it had been left to him, Sir Gerald Fitzmaurice would have construed the 'stabilization clauses' as being a prohibition against nationalization (even though the clauses, far from being 'for a relatively limited period', extended over the whole of the life of the Concession Agreement).

### *Summary*

The conflict between the parties on the issue of nationalization had begun as an important conflict of principle. The right of a developing nation to take full control of its oil production and reserves was in opposition to the rights of a private foreign corporation, relying upon a concession agreement buttressed by stabilization clauses. Yet, in the award, this clash of principle is less than the sound of distant drums. The decision appears to have turned—indeed, did turn—on a question of construction. As Sir Gerald Fitzmaurice expressed it:

<sup>104</sup> Separate opinion, para. 26.

<sup>105</sup> *Ibid.*, para. 30.

. . . my disagreement is not over the final figure of the Award, with which I concur,<sup>106</sup> but over the principle of the *interpretation* of the stabilization clauses—and here again, I am willing to concede the possibility (although, as will be seen, it is not in fact my view) that Aminoil's case had features that might take it out of the application of the normally accepted principles of interpretation.<sup>107</sup>

Perhaps the point to be made, however, is that questions of interpretation, or construction, are not decided in isolation. The stabilization clauses, like the other clauses in the Concession Agreement, had to be read in the light of the developments which had taken place both in international law and in the relationship of the parties since the original grant of the concession. This is no doubt what the members of the tribunal who constituted the majority had in mind when they spoke of 'a change in the nature of the contract itself, brought about by time and the acquiescence or conduct of the Parties' (award, para. 101). Although they declined to concede to a State the right to override private contractual commitments, they took the view that such commitments should be limited in duration: there was, they said, no rule of international law which prevented a State from agreeing not to exercise its right of nationalization 'during a limited period of time' (award, para. 90 (2)).

When these factors are taken into account, it is understandable that, in the absence of express words, the majority of the tribunal were not prepared to regard the stabilization clauses as imposing an absolute prohibition on the Government's exercise of its right to nationalize, provided (and this was never in issue) that 'appropriate' compensation was paid.

### III. APPROPRIATE COMPENSATION

In assessing what compensation would be appropriate, the tribunal decided that it was better to proceed 'by means of an enquiry into all the circumstances relevant to the particular concrete case, than through abstract theoretical discussion' (award, para. 144). Whilst this was a sensible and practical approach to the instant case, it makes it difficult to draw conclusions as to the principles on which compensation should be assessed in future cases of this kind. This difficulty is compounded by the fact that the tribunal did not hold the separate hearing on issues of quantum which it had proposed to hold, deeming that such a hearing

<sup>106</sup> It is difficult not to agree with Professor Higgins when she says: 'The Award, which touches on many questions of the greatest interest, purports to be unanimous. Sir Gerald Fitzmaurice wrote a Separate Opinion. But it is very hard to see, upon reading the arguments advanced in that Separate Opinion, that he was really in agreement with the *dispositif* of the Award': 'The Taking of Property by the State: Recent Developments in International Law', *Recueil des cours*, 176 (1982-III), at p. 305.

<sup>107</sup> Separate opinion, para. 19 (emphasis added).

'was not indispensable for the final adjustment of the present case' (award, para. 173).<sup>108</sup>

It is none the less worth attempting to ascertain on what principles the tribunal *did* in fact proceed in assessing the compensation due. This enquiry is assisted by a consideration of the way in which the different arguments of the parties were put, on this issue.

### *The Government's case*

The Government's case was simple. It was that the compensation payable should be assessed by reference to the net book value of Aminoil's fixed assets—the refinery, the gathering centres, the pumps, the pipelines and so on—in Kuwait and the divided zone. This value would be ascertained from the company's books of accounts, which would show the original acquisition cost of the assets, less any sums which the company had taken back by way of depreciation.

The total figure would not be a high one, since for the most part the fixed assets had been acquired years ago. However, there were good arguments in favour of this approach, as a matter of valuation—and indeed, as a matter of equity. First, the company had long since recouped the cost of the original investment and had been earning substantial profits on its investment. Secondly, the value to be placed on the company's fixed assets would come from the company's own books of account: in other words, it would be the company's own depreciated historical cost valuation of its fixed assets. Thirdly, although these values would be written down, because of allowances made by the company for depreciation, the sums allowed for depreciation would already have been taken by the company as cash, free from any fiscal imposition.

Aminoil argued that there was a flaw in the Government's case, in that any compensation for asset values should be based on depreciated replacement cost to reflect more accurately the 'true' value of the assets; and that compensation related to the net book value of the company's assets would not necessarily contain an element of compensation in respect of the value of the company itself, as a going concern. The Government was able to point out, however, that it had become established practice in the Gulf area for host governments to acquire partial or total control of operating companies on the basis of a payment related to the net book value of the fixed assets of the companies concerned. Indeed, the Government suggested that this practice had become so established as to constitute a new *lex petrolea* to govern the basis of compensation in such cases.<sup>109</sup>

<sup>108</sup> Reports made by each side's expert accountants had been submitted to the tribunal, but whilst these showed agreement on many of the figures in issue, there were areas of substantial disagreement—even though the accountants concerned happened to be the New York and the London offices respectively of the same firm!

<sup>109</sup> Khalid, *The General Agreement on Participation in respect of Crude Oil Concessions* (1973); El-Kosheri, *Recueil des cours*, 147 (1975-IV), pp. 256 ff.

*Aminoil's case*

Aminoil's case was, of course, totally different. Its claim was that it was entitled to compensation or damages for the illegal acquisition of its enterprise, such compensation to be the monetary equivalent of the complete restitution to the company of what it had lost.<sup>110</sup>

Aminoil put forward two methods of calculating its loss. The first of these was to project expected profits forwards, to the natural termination of the concession, and then to allow a discount so that the total so calculated was expressed in terms of its present value. On this basis the amount claimed was over US \$2,500 million, plus interest. In making this calculation, no account was taken of the value of Aminoil's fixed assets since, under the terms of the 1948 Concession Agreement, these were to revert to the Government free of charge at the natural termination of the concession.

The alternative method of calculation put forward by Aminoil was based on the premiss that the tribunal might only allow its claim for loss of profits for a limited period, rather than for a period which extended to the natural termination of the concession. Aminoil suggested that, if the tribunal took this course, it should award a sum in respect of 'lost profits' for the relevant period, together with a sum representing the estimated value of the fixed assets at the end of this period. Aminoil suggested that the value of the fixed assets should be assessed by what it would cost to *replace* them (rather than by their historic acquisition cost)—with, of course, some allowance by way of depreciation for the fact that the assets were not new. Aminoil assessed the value of its assets, on this 'depreciated replacement' basis, in the sum of US \$183,800,000, as at 1980.

*The tribunal's award*

The tribunal's award on the issue of compensation may be dealt with quite briefly. The tribunal considered that using 'net book value' to assess the value of fixed assets was only appropriate 'when it is a case of a recent investment, the original cost of which was not far from that of the present replacement cost' (award, para. 165). The tribunal recognized that 'net book value' had been widely accepted as a basis of compensation by oil companies in the area, but commented: 'It can be maintained that such acceptance was wise—but it would be somewhat rash to suggest that it had been inspired by juridical considerations: the *opinio juris* seems a stranger to consents of that kind' (see *North Sea Continental Shelf* cases, *ICJ Reports*, 1969, p. 45, cited in the award at para. 157).

The tribunal considered that, in the present case, 'depreciated

<sup>110</sup> In its claim for the monetary equivalent of *restitutio in integrum* Aminoil relied *inter alia* on the *Chorzów Factory* case (*Indemnity*), *PCIJ*, Series A, No. 17; the *Sapphire* arbitration, loc. cit. above (p. 81 n. 35), and the *Lighthouses* arbitration, award of 24 July 1956, 23 ILR 299, as well as on cases drawn from the domestic law of the United States, England, Germany and other countries.

replacement value' was the 'appropriate' measure to use (award, para. 178 (3)). However, the amount which the tribunal took for such depreciated replacement value was much less than the value assessed by Aminoil, since the tribunal's *total* award of compensation (approximately US \$176 million, when an agreed sum for 'non-fixed' assets is taken out) is *less* than Aminoil's claim, at 1980 prices, for depreciated replacement costs alone.

The tribunal also made an allowance for the value of the company itself as a going concern. In making this allowance (the amount of which was not separately quantified) the tribunal pointed out that Aminoil's calculation of 'lost profits' ignored the limiting effect of the 1973 Agreement and of the Abu Dhabi formula—in respect of both of which the tribunal's decision was in favour of the Government. The tribunal also pointed out that the parties, in the course of their negotiations, had adopted the concept of Aminoil's being entitled to a 'reasonable rate of return on its investment', and the tribunal indicated that it preferred this concept—which it referred to as 'the legitimate expectations of the concessionaire'—rather than the more aleatory concept of 'lost profits'.

It is thus possible to discern from the award the principles on which the tribunal proceeded in calculating the compensation due to Aminoil. None the less, there is (in terms of legal principle) a disappointing brevity in the tribunal's findings as to the precise amount due to Aminoil, which the tribunal itself summarized as follows:

For the purposes of the present case, and for the fixed assets, it is a depreciated replacement value that seems appropriate. In consequence, taking that basis for the fixed assets, taking the order of value indicated in the Joint Report<sup>111</sup> for the non-fixed assets, and taking into account the legitimate expectations of the concessionaire, the Tribunal comes to the conclusion that, at the date of 19th September, 1977, a sum estimated at \$206,041,000 represented the reasonably appraised value of what constituted the object of the takeover.

According to the above mentioned data, the sum total of the amount due to Aminoil as at 19th September, 1977, comes to \$206,041,000 less the liabilities of \$123,041,000, that is to say \$83,000,000. This represents the outcome of the balance-sheet of the rights and obligations of the Parties as at 19th September, 1977.<sup>112</sup>

### *Interest and inflation*

To its award of US \$83 million, the tribunal then added interest at the rate of 7.5 per cent per annum, and an allowance for inflation, which the tribunal fixed 'at an overall rate of 10% per annum' (award, para. 178 (5)). On this point, the tribunal's reasoning is not easy to follow. The tribunal arrived at the amount of compensation due to Aminoil as at 19 September 1977—in the sum of \$83 million. It then wished, quite properly, to bring

<sup>111</sup> This is a reference to the Joint Report of the expert accountants for each of the parties.

<sup>112</sup> Award, para. 178 (3) and (4).

this sum of money up to date—or, in other words, to state what sum should be paid in June 1982 as the equivalent of \$83 million in September 1977.

This is the type of problem which faces courts and tribunals every day of the year. The solution usually adopted is to build any calculations as to the effect of *inflation* into the principal sum awarded; and then to bring this sum up to date, as at the time of the court's judgment or the tribunal's award, by an award of *interest* at the appropriate rate.

In many countries, courts and arbitrators do not hesitate to award interest at high rates, if it seems right to do so. In Islamic countries, however, the award of interest is a more controversial matter and the law of such countries—including Kuwait—frequently sets a limit as to the rate at which interest may be awarded. It may be that the arbitral tribunal had this point in mind in awarding 'interest' at the rate of 7.5 per cent p.a., and then adding a separate allowance for 'inflation' at the rate of 10 per cent p.a., so as to produce an effective rate of 17.5 per cent.<sup>113</sup>

#### IV. CONCLUSION

The overall result of the tribunal's deliberations appears to have been satisfactory to both parties—which is a rare enough result in international commercial arbitration. The Government scored a major success when the legality of the Decree Law of 1977—an important matter of principle for the Government—was upheld.<sup>114</sup> The Government's monetary claims under the 1973 Agreement and the Abu Dhabi formula were also successful.

For its part, Aminoil was awarded the compensation to which it was entitled.<sup>115</sup> It is true that this compensation was not assessed on the punitive basis which Aminoil had sought—as damages for an 'illegal' act. Instead, it was assessed as the sum due as fair compensation for a legitimate act of nationalization. Nevertheless, the amount involved was considerable—and was paid without question, on the due date.

It seems plain, from reading the award, that the tribunal's main concern was to arrive at a fair and proper solution to the actual dispute which was before it, rather than to formulate far-reaching propositions of law which might (or again, might not) serve future generations of international lawyers. It should be said, however, that in its concern to establish a proper balance between the competing arguments and interests of the

<sup>113</sup> Since an interest rate is normally thought to be composed of two factors, a real rate of return and an inflation adjustment, an award of 'interest' at a rate of 7.5 per cent p.a. to reflect a real rate of return only could be construed as being a comparatively high award.

<sup>114</sup> In a typically generous comment, Maître J.-F. Lalive, one of Aminoil's counsel, has said: 'Sur ce point, le gouvernement remportait un succès incontestable puisque la légalité du décret de nationalisation—comme il avait toujours soutenu—est reconnue par le tribunal, sous la seule réserve d'une "indemnisation adéquate"': 'Contrats entre Etats et personnes privées', loc. cit. above (p. 100 n. 93), at pp. 156-7.

<sup>115</sup> In addition, the tribunal disallowed the Government's claim based on alleged 'bad oil-field practice' on the part of Aminoil, so that the company succeeded in this part of its case also.

parties, the tribunal was strikingly successful.<sup>116</sup> The parties, who had remained on good terms throughout the arbitration, accepted the award<sup>117</sup> without dissent. As for the future, the tribunal's moderate and pragmatic approach to the difficult issues with which it was confronted is likely to prove a better model for the resolution of disputes, and at the same time for the sensible development of the law, than the somewhat theoretical excursions of other international arbitrators.

<sup>116</sup> Cf. the comment of Maître J.-F. Lalive: 'Enfin, et ce n'est pas négligeable, le litige entre les parties a trouvé un point final dans un esprit d'harmonie': 'Contrats entre États et personnes privées', loc. cit. above (p. 100 n. 93), at p. 162.

<sup>117</sup> The award is printed in full, in its original English version, in *International Legal Materials*, 21 (1982), pp. 976-1053. An abridged version of the award appears in *Yearbook of Commercial Arbitration*, 9 (1984), pp. 71-96; and a French translation in *Journal du droit international (Clunet)*, 109 (1982), pp. 869-909.

# REJECTION OF FOREIGN LAW: SOME PRIVATE INTERNATIONAL LAW INHIBITIONS\*

By P. B. CARTER<sup>1</sup>

THE corpus of private international law is traditionally presented in three major divisions. These divisions are respectively designated jurisdiction, choice of law and foreign judgments. The first of these divisions, jurisdiction, relates to the limitations placed upon the competence of a national court which may result from the circumstance that in a private international law case the fact situation contains one or more foreign elements or bears an international complexion. The second division, choice of law, relates to the process and techniques to which a jurisdictionally competent court will resort in order to identify the *lex causae*, that is to say, the pattern of legal rules by reference to which the issues presented to it are to be determined. The third division of the subject, loosely labelled foreign judgments, denotes something rather different, namely consideration of the circumstances in which recognition will be accorded to the efficacy of a judgment of a foreign court, and the circumstances in which the present *forum* will sometimes go further and take authoritative steps with a view to enforcing such a judgment. This traditional arrangement of private international law does not, however, constitute simply a method of presentation, or a way of expounding the subject in an orderly fashion. Nor does it merely represent a well-tested way of promoting thought about the subject within a logical and readily comprehensible framework. It is an arrangement which rests upon certain fundamental assumptions, to query or doubt the validity of which would smack, or at least until recently would have smacked, of heresy.

Orthodoxy posits that the choice of law process is an essential element in any sophisticated system of private international law. There is here a basic assumption that it would not be acceptable to confine private international law to questions of jurisdiction—to the delimitation of the competence of a national *forum*, and to the delimitation, for recognition purposes, of the competence of foreign courts, when dealing with transnational fact situations—the corollary of such a confinement being that a jurisdictionally competent court would then always apply its own domestic law, although, of course, that law might itself include special rules for application in particular international situations. It may, however, be

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noted in passing that the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to be incorporated into English private international law by the Civil Jurisdiction and Judgments Act 1982, does represent, in the limited area of its operation, retreat from choice of law.

A related fundamental assumption of orthodox private international law is that a choice of law process must be directed towards the identification of a legal system by reference to which the rights of the parties to a dispute must automatically be determined, rather than towards the identification of a particular foreign rule apt for that determination. This is sometimes (rather infelicitously) referred to as a choice of jurisdiction approach as distinct from a choice of rule approach. It might be more aptly described as a choice of legal system approach. The validity of this assumption has been challenged in recent decades in the United States; but it remains firmly embedded in English private international law doctrine.

This article is written on the basis of acceptance of the validity of these two fundamental assumptions—that is to say, acceptance of the proposition that choice of law is a desirable, and often virtually an essential, ingredient of many branches of private international law, and acceptance of the proposition that choice of law involves choice of legal system not choice of specific rule. However, the risk involved in acceptance of these propositions is that unwavering and inflexible adherence to them is liable in practice to lead to palpable injustice in particular cases. That risk could be reduced by the careful and detailed formulation of a large number of choice of law rules, each tailored to cover a fairly precisely defined, and often relatively narrow, range of situations. In fact, however, private international law has been bedevilled by the generality of many of its choice of law rules. In any event there are limits on what could be achieved by way of rectifying this. Even if a high degree of refinement and detail is achieved in the formulation of choice of law rules, there will always remain *some* cases in which the application of an orthodox type of choice of law technique is liable to lead to an unjust result. There must therefore be instances in which refusal to apply the otherwise applicable *lex causae* is justifiable. In the interests of certainty and predictability of decision it is desirable that, so far as is practicable, these instances be classified, and be put into readily identifiable categories. This, in considerable measure, has been done in English private international law. An object of this article is consideration of the nature of, and justification for, some of these categories. The acceptance of the notion of choice of law, that is the acceptance of rules which require jurisdictionally competent courts to apply laws other than their own, coupled with the acceptance of the orthodoxy that choice of law denotes choice of legal system, has given rise to a need for escape routes. Rules permitting or requiring rejection of the *lex causae* in particular circumstances mark out these escape routes. It is obvious that in some respects access to these routes has to be easier than

would be the case if the aforementioned orthodoxies were to be abandoned—but in the author's view this price, although high, is not too high to pay for avoidance of the consequences of their abandonment. The escape routes must be well marked and clearly signposted. But, at the same time, the categories of permitted exclusion of foreign law must not themselves be too rigidly defined, or they will be in danger of being self-defeating. Unavoidably implicit in the interaction of choice of law and exclusion of foreign law is the familiar dilemma posed by the conflicting *desiderata* of on the one hand certainty and predictability of result, and on the other hand sufficient flexibility to accommodate what would otherwise be hard cases.

Basic English doctrine concerning the recognition and enforcement of foreign judgments is in one important respect more rigid and restrictive than is basic choice of law doctrine. Regarding foreign judgments the basic doctrine is that, provided the foreign court was jurisdictionally competent according to certain criteria, an English court will not enquire into the merits of the judgment, this meaning that it will not consider even the foreign court's choice of law. In these circumstances it is not surprising that in this branch of private international law some escape routes are well established and have been well trodden. They mostly take the form of defences to common law actions on unsatisfied foreign judgments *in personam*, and of reasons for refusing to register, or for setting aside registration, under respectively the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933. The defence of fraud (the definition of fraud for this purpose being idiosyncratically wide) represents a long established escape route in common law cases of indirect enforcement, and equivalent provisions are made in the 1920 and 1933 Acts. In the nature of things no analogous need for this particular escape route arises in the context of choice of law in an English *forum*. However, generally speaking and fraud apart, the circumstances and the situations in which there is liable to be a need to escape in English proceedings from the automatic application of the *lex causae* (that is from the law indicated by the relevant choice of law rule) have a more or less marked correspondence with the circumstances and situations in which there is a need to escape from the automatic impact of the general rule that the judgment of a jurisdictionally competent foreign court be recognized, and, where appropriate, enforced.

The nature of these escape routes, or categories of exclusion of foreign law, reflect *forum* inhibitions about applying, or sometimes even recognizing the application of, particular species of foreign law. In English private international law a classification of these categories has emerged which is generally accepted both in the choice of law context and in the context of recognition of foreign judgments. The categories cannot be regarded as entirely mutually exclusive. Moreover, some categories are themselves more precisely defined than are others.

First, an English court will not itself apply a foreign penal law. Nor will it enforce a foreign penal judgment. The dogma is that an English court will not lend its aid either directly or indirectly to the enforcement of a foreign penal law. Whether a law is penal depends primarily upon its purpose. The principal criterion is as to whether the main thrust of the law is the infliction of punishment at the instance of, or on behalf of, the State, or is the award of compensation.<sup>2</sup> The imposition of a penalty is said to reflect the exercise by a State of its sovereign power, and this can have no effect in the territory of another State. This is scarcely adequate either as an analytical, or as a practical, explanation of the rule. The ultimate explanation is probably to be found in more mundane considerations of policy and of practicality. The hard core of the rule can be expressed in the aphorism that there is no private international law of crime. States do not enforce each other's criminal laws. This is partly for reasons of policy; the content of criminal law, its sanctions, and the fact and methods of its enforcement are regarded as essentially and exclusively national or domestic matters. At the same time the rule is partly a consequence of the wide variety and often controversial nature of criminal penalties. Attitudes are not in all respects absolute as is evidenced by the growing proliferation of extradition treaties; but acceptance of the *forum* inhibitions reflected by this category of exclusion of foreign law is consonant with the present international order.

Secondly, but it is submitted much more controversially, it has been generally accepted since the time of Lord Mansfield, although the actual authority until 1955 was very meagre,<sup>3</sup> that an English court will not enforce either directly or indirectly a foreign revenue law. England, it would seem, should be a haven for foreign tax evaders and defaulters. In 1955 the *imprimatur* of the House of Lords was placed upon the rule in *Government of India v. Taylor*.<sup>4</sup> There an English company had carried on business in India, where it became liable for Indian capital gains tax on the sale of its business. The company was subsequently wound up in England, and the Indian revenue authorities lodged a claim in the liquidation proceedings in respect of that unpaid tax. The House of Lords held that the liquidator had been correct in rejecting this claim because only liabilities which could have been enforced against the company in England were properly receivable, and the liability, being a liability to pay tax imposed by a foreign government, could not have been enforced in England. It is to be noted that the Indian law was not a penal law. It is to be noted, too, that

<sup>2</sup> There is some authority for the view that a law may also be treated as penal if its purpose is the prevention of the commission of a crime. See *Schemmer v. Property Resources Ltd.*, [1975] Ch. 273, where Goulding J said (p. 288): 'In my judgment, and in the absence of specific legislation founded on treaties, preventive criminal justice is no more a proper subject of international enforcement than retributive criminal justice.'

<sup>3</sup> It seems to have consisted almost exclusively of two decisions at first instance: *Municipal Council of Sydney v. Bull*, [1909] 1 KB 7, and *Re Visser*, [1928] Ch. 877.

<sup>4</sup> [1955] AC 491.

it was far from being a law of a type unknown to the domestic law of the *forum*.

An English *forum* will not lend its aid to even the indirect enforcement of a foreign revenue law. Thus in *Rossano v. Manufacturers' Life Insurance Co.*<sup>5</sup> in an action on a debt, the debt being situated in Egypt, defendants in English proceedings were not allowed to rely upon garnishee orders served upon them in Egypt by the Egyptian revenue authorities in respect of tax allegedly unpaid by the plaintiffs. The defendants contended that payment to the plaintiffs would not absolve them from the obligation to comply with the orders as well. McNair J nevertheless held that the orders could not be recognized: '... I have reached the conclusion that the fundamental objection to the recognition of these orders is that their recognition would offend against the well-established principle that the English court will not recognise or enforce directly or indirectly a foreign revenue law or claim. . . .'<sup>6</sup> The defendants could not in effect contend that they would pay the plaintiffs' foreign tax instead of paying them.<sup>7</sup> McNair J's reference to recognition as distinct from enforcement could, however, be misleading. Lord Mansfield did say in a series of cases<sup>8</sup> that 'no country ever takes notice of the revenue laws of another', but it is now accepted that this is too wide. A distinction is to be drawn between indirect enforcement and recognition. In *Re Emery's Investment Trusts*<sup>9</sup> the equitable presumption of advancement raised by a husband's registration of securities in his wife's name could not be rebutted by evidence that his real purpose was to evade foreign income tax. Equity would not grant relief in respect of a transaction carried out in contravention of law, albeit a foreign revenue law. Note was taken of the foreign revenue law, but the effect of this was not to facilitate payment of the foreign tax.

*Forum* inhibitions concerning foreign revenue laws are similarly manifest in the approach taken to the recognition and enforcement of foreign judgments. In *United States of America v. Harden*<sup>10</sup> the Supreme Court of Canada upheld the refusal of the British Columbia Court of Appeal to allow an action on an unsatisfied Californian tax judgment. To have allowed it would have constituted indirect enforcement of a Californian revenue law. The Supreme Court also rejected the argument that an agreement by way of compromise for valuable consideration to pay a sum of money in satisfaction of a foreign tax claim could be enforced as a contract. Of this argument Cartwright J, delivering the judgment of the Court, said: 'We are concerned not with form but with substance, and, if it can properly be said that the respondent made an agreement, it was simply

<sup>5</sup> [1963] 2 QB 352.

<sup>6</sup> *Per* McNair J at p. 376.

<sup>7</sup> On the withholding of indirect enforcement see, too, *Brokaw v. Seatrain UK Ltd.*, [1971] 2 QB 476, below.

<sup>8</sup> *Planché v. Fletcher* (1779), 1 Doug. 251, 253; *Holman v. Johnson* (1775), 1 Cowp. 341, 343; *Lever v. Fletcher*, unrep.

<sup>9</sup> [1959] 1 Ch. 410.

<sup>10</sup> [1963] SCR 366; (1964) 41 DLR (2d) 721.

an agreement to pay taxes which by the laws of the foreign state she was obligated to pay.<sup>11</sup>

The general rule relating to foreign revenue laws is now firmly established, and its implications have been somewhat relentlessly worked out, but two basic questions still remain. What is meant by a revenue law? And why should such a law not be enforced?

Characterization or categorization of a law as revenue or otherwise is, of course, a matter for the *forum*. For example, in the Scottish case of *Metal Industries (Salvage) Ltd. v. Owners of ST 'Harle'*<sup>12</sup> it was held that a claim on behalf of the French Government, in respect of arrears of compulsory employer's contributions to a French State health insurance and family benefits scheme for seamen, was not enforceable in Scotland, although by French law it might not be regarded as a revenue law. But what is the criterion to be applied in an English or Scottish *forum*? Dicey and Morris state that 'A "revenue law" has not been defined, but seems to be a rule requiring a non-contractual payment of money or kind in favour of a central or local government'.<sup>13</sup> Some examples are given of laws that have been characterized as revenue laws: rules imposing income tax,<sup>14</sup> customs duty,<sup>15</sup> stamp duty,<sup>16</sup> succession duty,<sup>17</sup> municipal rates,<sup>18</sup> capital gains tax,<sup>19</sup> and a profits levy.<sup>20</sup> On the other hand, *moratorium* laws<sup>21</sup> and rules abrogating gold clauses,<sup>22</sup> which do not provide for the collection of money but rather for the protection of its value, have not been so classified. The courts have adopted an ambivalent attitude towards foreign currency and exchange control regulations. These have been said by the House of Lords not to be revenue laws: *Frankman v. Prague Credit Bank*<sup>23</sup> and *Kahler v. Midland Bank*;<sup>24</sup> but reservations as to whether this is so for all purposes were expressed by Slade J in 1977 in *Re Lord Cable*.<sup>25</sup> It is to be noted, too, that, whereas in the *Metal Industries (Salvage)* case<sup>26</sup> a rule imposing compulsory contributions to a State insurance scheme was held to be a rule of revenue law, rules under which a State can recover social security payments have been held in Canada not to be rules of revenue law,<sup>27</sup> and in

<sup>11</sup> [1963] SCR 366, 371; (1964) 41 DLR (2d) 721, 725.

<sup>12</sup> [1962] Scots LT 114.

<sup>13</sup> Dicey and Morris, *The Conflict of Laws* (10th edn., 1980), p. 92.

<sup>14</sup> *Indian and General Investment Trust Co. Ltd. v. Borax Consolidated Ltd.*, [1920] 1 KB 539, 550. See, too, *United States of America v. Harden*, above.

<sup>15</sup> *Holman v. Johnson* (1775), 1 Cowp. 341, 343; *Attorney-General for Canada v. Schulze* (1901), 9 SLT 4.

<sup>16</sup> *James v. Catherwood* (1823), 3 Dow. & Ry. (KB) 190, 191.

<sup>17</sup> *Cotton v. R.*, [1914] AC 176, 195; *Re Visser*, [1928] Ch. 877; *Re Lord Cable*, [1977] 1 WLR 7, 13.

<sup>18</sup> *Municipal Council of Sydney v. Bull*, [1909] 1 KB 7, 12.

<sup>19</sup> *Government of India v. Taylor*, above.

<sup>20</sup> *Peter Buchanan Ltd. v. McVey*, [1954] IR 89; [1955] AC 516 n.

<sup>21</sup> *Re Helbert Wagg & Co. Ltd.'s Claim*, [1956] Ch. 323.

<sup>22</sup> *R v. International Trustee for the Protection of Bondholders*, [1937] AC 500.

<sup>23</sup> [1948] 1 KB 730, 746.

<sup>24</sup> [1950] AC 24, 26-7.

<sup>25</sup> [1977] 1 WLR 7, 13.

<sup>26</sup> Above. But cf. *The Acrux*, [1965] P 391.

<sup>27</sup> See alternative *ratio* (or *dictum*) in the Manitoba case of *Weir v. Lohr* (1967), 65 DLR (2d) 717.

New Zealand rules for the obtaining of legal aid contributions have been held not to be rules of revenue law.<sup>28</sup> These doubts and apparent inconsistencies must reinforce curiosity as to the purpose and rationale of the rule that courts will not enforce either directly or indirectly foreign revenue laws.

Why should a rule of foreign law be accorded markedly less respect than would otherwise be the case *simply* because it is a rule of 'revenue' law? In *Taylor's* case Lord Somervell said: 'Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction.'<sup>29</sup> This, with all respect, to the extent that it is not simply a restatement of the rule in the form of a principle, smacks of excessive formalism. If there is any justification for discriminating against foreign revenue laws, it must be found in more practical considerations. Moreover, account must be taken of a strong countervailing consideration. This latter derives from the fact that in modern times the State, and organs of the State, have become involved in a wide and diverse range of day-to-day commercial, quasi-commercial, and social activities—from the fact that, for example, State or local authority provision of services in return for direct or semi-direct payment has become commonplace.

Of course, if a foreign revenue law is penal in nature, it will not in any event be enforced. Again, if, as will be pointed out below, it is expropriatory in nature it will sometimes for that reason be denied even recognition. Or again, as is also discussed below, if the content of a foreign rule is unacceptably repugnant it will be rejected on grounds of public policy: a court will, for example, have severe reservations about enforcing a foreign law which discriminates on the basis of race, colour or creed quite regardless of whether the law is a revenue law. The question under consideration now is as to whether the mere fact that a foreign law is a revenue law should *in itself* constitute an absolute bar to its enforcement in another *forum*. What policy requires that, whereas the use of the courts as instruments for the enforcement of locally imposed obligations to pay taxes is legitimate and desirable, their use as instruments for the enforcement of similar validly imposed foreign obligations is in no circumstances to be countenanced? As a distinguished Canadian writer on private international law has written: 'Why is it unlawful in Canada to evade local taxes and yet perfectly legitimate to refuse to pay foreign taxes? How can the public policy of Canada be invoked to protect foreign tax dodgers when our own legislative bodies impose similar taxes?'<sup>30</sup> Consideration of specific cases only emphasizes the difficulty in answering these general questions. For example, is there some overriding justification for a national court's refusal to enforce a foreign rating authority's claim for the payment of general rates lawfully imposed upon the authority's local

<sup>28</sup> *Connor v. Connor*, [1974] 1 NZLR 632.

<sup>29</sup> [1955] AC 491, 514.

<sup>30</sup> Castel, *Canadian Conflict of Laws* (1975), vol. 1, p. 64.

residents? Should it make any difference if the rate is one imposed for a particular purpose such as a water rate? In such a case should this depend upon the extent to which the amount is calculated by reference to the quantity of water consumed? If a service such as electricity is supplied by a local authority, does policy require that foreign courts discriminate between claims for unpaid electricity bills where the obligation to pay is contractual and claims where it is statutory? Or again, should a *forum* discriminate in this regard between claims by local authority suppliers and claims by private suppliers? If so, on which side of such a line should the position of a foreign equivalent of a Crown corporation fall?

If there be some policy which requires that a national *forum* never enforce a foreign revenue law, it is perhaps permissible to conjecture why this policy does not reach out to cases in which all that is at issue is bare recognition. A *dictum* of Lord Denning MR in *Brokaw v. Seatrain UK Ltd.*<sup>31</sup> is illuminating in this connection. In that case goods were shipped in a United States ship from Baltimore, in the State of Maryland, to London via Southampton. While the ship was on the high seas the United States Treasury served on the shipowners in the United States a notice of levy in respect of unpaid tax demanding surrender of any property in their possession belonging to two United States taxpayers. When the ship docked at Southampton the United States Government claimed possession of the goods by virtue of the notice of the levy. The plaintiffs, who were the ultimate consignees of the goods, brought an action in detinue in England against the defendant shipowners for the return of the goods and damages for their detention. On the shipowners' interpleader summons, bringing in the Government of the United States as claimants, the Master ordered that they be barred. The claimant government unsuccessfully appealed from the Master's Order to the Court of Appeal. Lord Denning MR, delivering the judgment of the Court, held that the claim of the Government of the United States was a claim to enforce, albeit indirectly, part of its revenue law and must, accordingly, fail. This is clearly in accord with the principles laid down by the House of Lords in the *Taylor*<sup>32</sup> case, and more specifically follows the decision in *Rossano v. Manufacturers Life Insurance Company*.<sup>33</sup>

What is of wider interest is that Lord Denning MR did go out of his way to point out that

If this notice of levy had been effective to reduce the goods into the possession of the United States Government, it would, I think, have been enforced by these courts, because we would then be enforcing an actual possessory title. There would be no need for the United States Government to have recourse to their revenue law . . . . If the United States Government had taken these goods into their actual possession, say in a warehouse in Baltimore, or maybe by attornment of the master to an officer of the United States Government, that might have been

<sup>31</sup> [1971] 2 QB 476.

<sup>32</sup> [1955] AC 491, above.

<sup>33</sup> [1963] 2 QB 352, above.

sufficient to enable them to claim the goods. But there is nothing of that kind here. The United States Government simply rely on this notice of levy given to the shipowners, and that is not, in my view, sufficient to reduce the goods into their possession.<sup>34</sup>

The technical distinction adverted to by the Master of the Rolls is, of course, clear. On the other hand, that the outcome of the proceedings should turn upon such a distinction is indicative. If a foreign government seeks to enforce indirectly a tax law by seeking the surrender of a defaulting taxpayer's goods, it will fail. If, on the other hand, the seizure has already taken place, this seizure may well be respected. Comment is scarcely necessary.

It is perhaps salutary for an English lawyer to reflect upon how he would be disposed to regard the attitude of a foreign court which *mutatis mutandis* declined to enforce a British governmental or local authority's claim against a defaulting taxpayer or ratepayer who had taken refuge in the foreign haven.

It must of course be conceded that the reversal of the rule in *Government of India v. Taylor* would have certain important consequences. It would give rise to a need for the formulation of rules to govern jurisdiction, and of choice of law rules to be applied, in revenue matters. Hitherto the need for such rules specifically tailored so as to accommodate such matters has been largely obviated by the blanket refusal to enforce foreign revenue laws or foreign revenue judgments. The lifting of that blanket might properly provoke *de novo* consideration of the appropriateness in this area of the general rules of English private international law relating both to the jurisdiction of English courts, and to the jurisdiction of foreign courts in the context of recognition and enforcement of their judgments. The formulation of relevant choice of law rules would also demand careful thought. Moreover, it would be necessary to ensure that the new pattern of the law could accommodate the various types of double taxation agreement entered into between States. Satisfaction of all these needs might well be a formidable task of considerable complexity. Total refusal to enforce foreign revenue laws has, it must be readily conceded, one undoubted attraction—that of simplicity. This is a quality which it shares with many arbitrary and irrational phenomena.

Exclusion of a third category of foreign law is sometimes said to derive from the proposition that a national court will not give extraterritorial effect to foreign expropriatory laws. In England, whereas by virtue of the doctrine of *Luther v. Sagor*<sup>35</sup> such a law will be accorded recognition to the extent that it affects property which was situated at the time of the expropriation within the territory of the expropriating State, it will not be treated as affecting property situated in England at that time.<sup>36</sup> In *Luther*

<sup>34</sup> [1971] 2 QB 476, 482-3.

<sup>35</sup> [1921] 3 KB 532.

<sup>36</sup> *Bank voor Handel en Scheepvaart v. Slatford*, [1953] 1 QB 248. Although Devlin J there declined

v. *Sagor* a Russian timber merchant failed to obtain a declaration that he was still owner of timber which had belonged to him before title to it had been vested in the Soviet State under a Soviet decree. The timber, although subsequently brought to England and still in England at the time of the English proceedings, had been situated in Russia at the time of the expropriatory decree. If the operative principle here is simply that the *lex situs* governs, no departure from otherwise applicable private international law is involved, and a separate category of exclusion of foreign law is not constituted. It is, however, to be noted that on this basis if, for example, in *Luther v. Sagor* the timber had been situated in a third country at the time of the Soviet decree, an English court would have determined its effect upon the claimant's title to it in the way in which that issue would have been determined in the courts of that third country—even though this could involve the English court in giving extraterritorial effect to the decree. This, it is submitted, is the correct approach. That public international law does not generally require that a State give extraterritorial effect to such decrees is no reason for denying a State the right to do so in what it deems to be appropriate cases through the application of its own rules of private international law. In proprietary matters the doctrine of the *lex situs* is well established in the private international law of most States, and departure from it calls for strong and specific justification. If a foreign expropriatory law is penal, or if its content is so unacceptably repulsive that it will be rejected on grounds of public policy, effect will not be given to that law. This is, however, not to say that *any* expropriatory law—this broad category covering cases of nationalization and requisition as well as confiscation—should automatically be accorded a respect less than that required by general rules of private international law.

Fourthly, there is some authority for the view that an English court will not enforce the 'public laws' of another State. There is here a threshold problem—that of definition. It might be said that a public law is generally a law which by its nature cannot be directly enforced in the country of its enactment or promulgation by an individual as distinct from the State or an instrumentality of the State. This, like any definition of public law, is open to criticism, but the important issue is more fundamental than mere agreement upon an acceptable verbal formulation. As a distinguished United States scholar has written in a rather different context, the distinction between public and private law

postulates a day when private property, private wrongful conduct, and private contract were indeed separated intellectually, legally, sociologically; and, in many ways, economically and politically, from the activities of the state. That day is long

to follow the earlier case of *Lorentzen v. Lydden & Co.*, [1942] 2 KB 202, and *Slatford's* case was itself reversed on other grounds on appeal ([1954] AC 584), it is generally accepted as representing English law. See, too, to the same effect the Scottish case of *Government of the Republic of Spain v. National Bank of Scotland*, [1939] SC 413.

gone. Only in rarefied legal conceptions, in political polemics, and in the romance of nostalgia does this distinction still operate. It may in some legal systems be a handy part of a table of contents, but it is little more than that. . . . We live in a day when multinational and other huge agglomerations of so-called private power are tightly intermeshed at all levels with more traditional sovereigns. To try to distinguish between public and private law in such circumstances as a basis for determining a court's jurisdiction is most unwise.<sup>37</sup>

The House of Lords has recently confirmed in *Buttes Gas and Oil Co. v. Hammer (Nos. 2 and 3)*<sup>38</sup> that there exists in English law a general principle that the courts will not adjudicate upon the transactions of foreign sovereign States. Lord Wilberforce (with whose judgment the other Lords of Appeal concurred) saw the doctrine as being one of judicial restraint or abstention,<sup>39</sup> but he emphasized that 'This principle is not one of discretion, but is inherent in the very nature of the judicial process'.<sup>40</sup> The principle is a general one, but it is a principle that is essentially concerned with judicial restraint or abstention in relation to what may be described as 'inter-state issues and/or issues of international law'.<sup>41</sup> It in no way indicates judicial unwillingness to apply foreign 'public' laws generally. On the present state of English authorities, laws falling into this latter category can realistically only be seen as constituting a somewhat miscellaneous group of unenforceable foreign laws. Dicey and Morris describe them as 'all those rules (other than penal and revenue laws) which are enforced as an assertion of the authority of central or local government. It is a residual category which will include such topics as import and export regulations, trading with the enemy legislation, price control regulations and anti-trust legislation.'<sup>42</sup> The learned authors also suggest that, although the authority is very slight, even a title to property validly acquired by way of a recognized foreign expropriatory law (recognized because the property was situated in the country of expropriation at the relevant time) will not be enforced, as distinct from merely recognized, in England if the property has not already been reduced into the possession of the foreign expropriatory State or its agent.

It is submitted that the case for withholding or limiting the effect to be given to each of these miscellaneous types of foreign 'public' law should be assessed on its individual merits. In the case of some of them, not least the last mentioned,<sup>43</sup> the merits may not be great. Be this as it may, their existence certainly does not warrant any general assertion that a court will

<sup>37</sup> Macneil, *Canadian Business Law Journal*, 7 (1982-3), pp. 432-3. For a full comparative treatment of public law in private international law see Mann, *Recueil des cours*, 132 (1971-I), pp. 107 ff.

<sup>38</sup> [1982] AC 888.

<sup>39</sup> Ibid. 931.

<sup>40</sup> Ibid. 932.

<sup>41</sup> Ibid. 938.

<sup>42</sup> Dicey and Morris, *The Conflict of Laws* (10th edn., 1980), pp. 93-4.

<sup>43</sup> The only justification offered in *Dicey and Morris* for the suggestion that an expropriatory title validly acquired under the *lex situs* should be regarded in England as a 'valid but unenforceable title' unless the property has already been 'reduced into the possession of the foreign State' (although, it would appear, perhaps is no longer in that possession), is the dogma that 'the courts have no jurisdiction to countenance a claim by a foreign State based upon an exercise of its sovereign power'

not apply foreign public laws—an assertion of uncertain meaning and of possibly dangerous width.

Fifthly and finally, sometimes an English court will refuse on grounds of public policy to apply a particular rule of foreign law which would otherwise fall to be applied. Equally a foreign judgment may be denied recognition on the ground that the foreign court did apply such a rule. Overt resort to public policy in English private international law is, however, relatively rare, or at least considerably more rare than has been resort to corresponding doctrines in the private international law of many countries of continental Europe. Public policy should not be invoked in private international law merely because it could be invoked in the *forum* if the same facts had been presented in a purely domestic context—unless, of course, the domestic law of the *forum* is the *lex causae*. Courts should heed the famous words of Cardozo J in *Loucks v. Standard Oil Co.*:<sup>44</sup>

The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common-weal.

In the nineteenth century and in the early years of the present century resort was, it is true, occasionally had more freely to public policy so as to avoid the application of an unfamiliar foreign law; however, subsequently greater restraint was exercised. It is instructive to contrast, for example, the approach of the Court of Appeal in 1904 in *Kaufman v. Gerson*<sup>45</sup> with that taken half a century later by Streatfield J in *Addison v. Brown*.<sup>46</sup> In the former case the plaintiff, a domiciled male French national, had coerced the defendant, a domiciled female French national, into signing a contract in France by threatening that if she refused he would prosecute her husband. The defendant's husband had misappropriated money entrusted to him by the plaintiff, and by the contract the defendant undertook to repay the plaintiff by instalments the full amount misappropriated. The contract was seemingly valid by French law, but the English Court of Appeal refused to enforce a contract entered into under duress because to do so would 'contravene what by the law of this country is deemed an essential moral interest'.<sup>47</sup> '[I]t is a universal principle of the courts of this country that they will not enforce any contract which has

(Dicey and Morris, *op. cit.*, p. 94). It is not easy to discern the policy underlying a rule which would deny the claim of a foreign State to property to which it is acknowledged to be entitled unless the property has at some stage already been 'reduced into its possession'—especially as 'reduction into possession' can itself in some circumstances be a process of dubious attraction.

<sup>44</sup> 224 NY 99, 111; 120 NE 198, 202 (1918).

<sup>45</sup> [1904] 1 KB 591; recently referred to as 'a very extraordinary case': *Israel Discount Bank v. Hadjipateras*, [1984] 1 WLR 137, *per* O'Connor LJ at p. 146.

<sup>46</sup> [1954] 1 WLR 779.

<sup>47</sup> [1904] 1 KB 591, 599–600.

been brought about by coercion.<sup>48</sup> In *Addison v. Brown* a wife sued a husband to recover arrears of maintenance due under a contract governed by Californian law. This contract contained a clause ousting the jurisdiction of the Californian courts. It was argued that such an agreement would be contrary to public policy under English domestic law. Streatfield J rejected the contention that for this reason the action could not be heard.

The fact that overt resort to public policy became, and in spite of recent developments to be considered below still is, relatively rare in English private international law cannot, however, be seen as a symptom of an 'internationalist' attitude. Indeed, it is in a sense an indication of the contrary, for it in part results from the *forum*-orientated bias built into many English choice of law rules themselves. English domestic law is applied in many cases of family law, e.g. divorce, separation, guardianship, custody, adoption and maintenance, in which under many foreign systems a law other than that of the *forum* might fall to be applied. So in these spheres of law in England the opportunities are fewer, and the pressure is the less, for resort to public policy in order to avoid the application of a rule of a foreign *lex causae*, than is often the situation elsewhere. Similarly there may be little scope for the doctrine of public policy in English tort actions if it is still the law that no such action will lie at all unless *inter alia* the wrong complained of would be actionable under English domestic law. Indeed it is perhaps significant that it is in the private international law relating to commercial contracts—an area in which English choice of law rules are markedly 'internationalist'—that public policy has been most frequently successfully invoked in England.

It would be both difficult and undesirable to attempt anything approaching a catalogue of types of case in which public policy does, or should, operate. Even a general classification has its hazards. But two formal patterns of the operation of the doctrine are discernible.

First, the doctrine may be invoked if the nature or content of the foreign rule is so unacceptably repugnant that it could never be applied in England, nor could its application elsewhere necessarily be recognized in England. A contract for the sale of slaves would not be enforced in England, nor would an action on a foreign judgment enforcing such a contract be entertained.<sup>49</sup> The case of a foreign prostitute suing for her unpaid honorarium is probably in the same category. As Lord Cross (with whom Lords Hailsham, Hodson and Salmon agreed) said in *Oppenheimer v. Cattermole*<sup>50</sup> of a German law depriving German Jews living abroad of

<sup>48</sup> It may be noted, however, that in the very recent case of *Israel Discount Bank v. Hadjipateras*, [1984] 1 WLR 137, at least one member of the Court of Appeal would have been willing, had it been necessary, to apply the principle 'that an agreement obtained by undue influence, like an agreement obtained by duress or coercion, may [*sic*] be treated by our courts as invalidating a foreign judgment based upon the agreement, or as a ground for not enforcing it as contrary to the distinctive public policy of this country' (*per* Stephenson LJ at p. 143).

<sup>49</sup> Although this was not always the case; see *Santos v. Illidge* (1860), 8 CB (NS) 861. See, too, *Harris v. Cooper* (1871), 31 Upper Canada QB 182.

<sup>50</sup> [1976] AC 249.

German nationality and of their property without compensation: 'To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all.'<sup>51</sup> So, too, a foreign status or incapacity based upon purely religious or racial discrimination might well not be recognized. It is to be emphasized that, as Stephenson LJ has recently observed,<sup>52</sup> in this type of case it has been 'only because the law or practice of the foreign country . . . differed from that policy [i.e. the distinctive public policy of the *forum*] that the question . . . was raised'. At the same time it is to be remembered that unfamiliarity with the type of foreign law in question is obviously not in itself a ground for denial of recognition. Foreign legitimations by subsequent marriage were recognized in England long before legitimation was possible under English domestic law. And polygamous marriages are now recognized in England for almost all purposes. Moreover, the mere fact of unfamiliarity ought usually to carry little, if any, weight in assessing unacceptable repugnance.

It is to be noticed that in this framework within which resort to public policy operates there is implicit something of an 'all or nothing' attitude. If a foreign law is unacceptable, it is totally unacceptable regardless of the context. This lack of sophistication can lead to difficulty. Consider for example the case of a person wishing to marry in England who lacks capacity by the law of his or her domicile on the ground of race or colour. That incapacity would rightly be disregarded for reasons of public policy. Should it necessarily follow that an English court should also regard as valid a marriage celebrated in the country of the domicile between two local domiciliaries, that marriage being according to the law of that country, although valid in point of form, void on the ground of this incapacity? Has not the time come perhaps to recognize openly that there is a separate category of foreign laws for which a *forum* may have a marked distaste—not sufficiently strong for it to reject them altogether—but sufficiently strong to warrant denying them efficacy unless the facts are in effect entirely domestic to the foreign country in question. There would, of course, still remain some types of law to be rejected absolutely.

The other framework within which public policy may be seen to operate is one in which the focus is not so much upon the nature or content of a foreign rule, but rather upon the undesirability of a British court being seen to act in a particular way. The main thrust of public policy here is not to achieve the rejection of an intrinsically repugnant foreign rule, but rather to protect the public or national interest or image of the United Kingdom. Thus public policy may require that a court should not enforce, or even recognize the enforcement of, an otherwise valid transaction if the fact of such enforcement or recognition would be liable to jeopardize good relations existing at a national, or even political, level between the United Kingdom and a foreign State. For example, a contract of loan for the

<sup>51</sup> At p. 278.

<sup>52</sup> *Israel Discount Bank v. Hadjipateras*, [1984] 1 WLR 137, 144.

purpose of financing a revolt in a friendly foreign country would not be enforced in England although valid by its proper law. Two cases may be mentioned: *Foster v. Driscoll*<sup>53</sup> which was concerned with a contract for the introduction of liquor into the United States during the prohibition era; and *Regazzoni v. Sethia*<sup>54</sup> which was concerned with a contract to circumvent an Indian law prohibiting the export of certain commodities from India to South Africa. In neither case was the contract enforced. It is true that in each case the *lex causae* was English, but it can be assumed that enforcement would have been refused even if it had been the law of a third country. The overriding principle is that an English court will decline to take action which would be liable to be significantly detrimental to the national or international interests of the United Kingdom, and this is so regardless of the identity of the *lex causae*.

In some cases these two recognized patterns of public policy invocation may seem to overlap or coalesce; the case of a contract to bribe a foreign customs officer might be seen as exemplifying this.

To be distinguished from the invocation of public policy is the refusal of an English court to recognize a foreign judgment on the ground that it was obtained in circumstances amounting to a denial of natural justice. Denial of natural justice denotes procedural unfairness. A typical instance is one in which a defendant was not given notice, or was given inadequate notice, of the foreign proceedings; or one in which he was not given an opportunity to present his case. In practice the English courts have shown themselves somewhat loath to deny recognition to a foreign judgment solely on this ground. When recognition has actually been withheld there has usually been present some additional factor such as fraud.

The extent to which public policy may properly be invoked even within these two general frameworks inevitably allows for considerable variation; and, indeed, as social attitudes change, so variations are warranted with the passage of time. Nevertheless it is trite learning that public policy is an unruly horse, and courts should heed the words of a distinguished American writer on the conflict of laws, Professor George Stumberg, words uttered nearly fifty years ago: 'The real difficulty with public policy as a limitation is that it is incapable of measurement. All law is an expression of policy, and whether a particular foreign rule falls under the ban is a matter of opinion which can easily become a matter of whim.'<sup>55</sup> In private international law there is superimposed an additional factor making for unruliness in the horse. This stems from a natural, if often subconscious, 'homing instinct' on the part of judges. There is the temptation to apply standards which may be apt in a domestic factual context but which are not apt universally, for public policy ever beckons as the easy escape route to the familiar comforts of the *lex fori*. However, as has already been suggested,<sup>56</sup> English judges, at least by comparison with

<sup>53</sup> [1929] 1 KB 470.

<sup>55</sup> Stumberg, *Conflict of Laws* (1937), p. 179.

<sup>54</sup> [1958] AC 301.

<sup>56</sup> p. 122, above.

continental counterparts and at least since the early years of the present century, have for one reason or another been largely able to withstand these dangers,<sup>57</sup> both when deciding whether the content of a foreign law is so intrinsically repugnant that it can never be applied, nor can its application in a foreign court ever be recognized, in an English *forum*; and also when deciding whether the fact of enforcement by a British court of a particular rule or transaction, English or foreign, would be unacceptably detrimental to the national interest.

However, a purpose of this present article is to draw attention to something different—namely, that in recent years there have been various and ominous indications of a judicial willingness to see public policy in private international law as operating outside these two frameworks, and indeed in effect as operating outside any framework at all. This wide-ranging operation of the doctrine is markedly reminiscent of the hazy notion that English courts have an inherent residual ‘last-ditch’ discretion (sometimes put in terms of doing ‘substantial justice’ between particular parties in particular cases) to which resort has occasionally been had in the past—mostly in certain family law contexts. A relatively early example was provided by the Court of Appeal case of *Gray (or se. Formosa) v. Formosa*.<sup>58</sup> There a Maltese nullity decree was denied recognition on the ground that recognition would offend against English notions of ‘substantial justice’. At least one member of the Court conceded that the Maltese court was jurisdictionally competent, the parties being domiciled there. No Maltese procedural inadequacy or unfairness was found. The Maltese court had annulled the marriage because by Maltese law the man, who was a Maltese Catholic domiciled in Malta, had no capacity to marry except in accordance with the rites of the Catholic Church. The marriage had in fact taken place in an English register office. The Court of Appeal did not assert that the rule of substantive law applied by the Maltese court was so intrinsically objectionable that its application could never be countenanced in an English *forum*, or indeed that its application should be confined to purely Maltese fact situations. The Court instead held in effect that the recognition of its application *on the facts of the instant case* would cause substantial injustice. The focus is not on the content of the foreign rule, but upon the consequences of recognition in the particular circumstances of an instant case. That the Court decided in

<sup>57</sup> In the recent case of *Empresa Exportadora de Azucar v. Industria Azucarera Nacional SA (The Playa Larga)*, [1983] 2 Ll.R.171 (see vol. 54 of this *Year Book*, pp. 297 ff.), the Court of Appeal declined to disregard a Cuban law freezing all property wholly or partly owned by Chilean official agencies or by juridical persons in which the Chilean State had an interest. The law was seen as a legitimate means of achieving compensation for damage to Cuban property resulting from a political coup in Chile. The court distinguished the words of Lord Cross in *Oppenheimer v. Cattermole*, [1976] AC 249, 278, cited above, and also referred to the possibility of jeopardizing friendly relations at the national level. Ackner LJ, speaking for the Court of Appeal, said (at p. 190): ‘A judge should, of course, be very slow to refuse to give effect to legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction.’

<sup>58</sup> [1963] P 259.

terms of doing 'substantial justice' rather than in terms of public policy is itself perhaps indicative of a judicial consciousness of the novelty in the approach.<sup>59</sup>

This new and ill-defined enhanced scope for public policy has been manifested in a statutory context by the loose interpretation that has been placed upon the wording of section 8 (2) (b) of the Recognition of Divorces and Legal Separations Act 1971. It provides that recognition of a foreign divorce or legal separation shall be withheld if 'recognition would manifestly<sup>60</sup> be contrary to public policy'. In *Kendall v. Kendall*<sup>61</sup> Hollings J refused on grounds of public policy to recognize a Bolivian divorce, even though the actual ground upon which the divorce had been granted by the Bolivian court was physical cruelty—a ground obviously in no way in itself repugnant to English public policy. There had in a very real sense been a gross denial of natural justice in the Bolivian proceedings, but the learned judge, construing section 8 (2) (a) (which deals with non-recognition on that ground) very narrowly, declined to withhold recognition on this basis. Instead he clearly took the view that section 8 (2) (b) empowered him to refuse recognition on 'public policy' grounds if to grant it would in the circumstances of the particular case lead to an unfair result. Again, in *Joyce v. Joyce and O'Hare*<sup>62</sup> Lane J gave the same sort of twist to traditional public policy doctrine in English private international law. She first declined to recognize a Quebec divorce on the ground that there had been a denial of natural justice in the Quebec proceedings, the respondent wife there not having been given a reasonable opportunity to participate. Lane J then gave in five lines, as an alternative ratio for her decision, a finding that recognition would 'manifestly be contrary to public policy' within the meaning of section 8 (2) (b)—even though the Quebec divorce had seemingly been pronounced on the ground of mental cruelty. English courts have often recognized decrees granted on this ground without the spectre of public policy being raised. What is most remarkable, however, is that Lane J did not refer to the content of the Quebec law, but merely indicated that the factors, which she thought it proper to take into account when considering whether the wife had in fact had an adequate opportunity to participate in the Quebec proceedings, in themselves also justified her in invoking the doctrine of public policy. This alternative ratio was in effect that the wife had had a rather raw deal.

The Recognition of Divorces and Legal Separations Act 1971 was largely based upon an international convention. This provokes the

<sup>59</sup> In *Gray (or se. Formosa) v. Formosa* it would seem that what may be described as substantial justice was only achieved by virtue of the combination of refusal to recognize the Maltese nullity decree with the immediately subsequent granting of a divorce. But for the availability of that divorce it would appear that departure from the normal recognition rules could well have actually caused substantial injustice. See vol. 38 of this *Year Book*, pp. 497 ff.

<sup>60</sup> The use of the word 'manifestly' is curious. If contravention of public policy were to be serious but insidious, could it be said to be manifest?

<sup>61</sup> [1977] Fam. 208.

<sup>62</sup> [1979] Fam. 93.

conjecture that, in order to achieve international agreement on the terms of such conventions, there may be a temptation to introduce a loose 'public policy' type escape clause, which is liable to be variously utilized by different countries subscribing to the convention. In this way a spurious appearance of uniformity may be achieved, but uncertainty is introduced into national laws.

In a recent House of Lords case not involving statutory interpretation, approval appears to have been bestowed upon this new unstructured role for public policy in English private international law. In *Vervaeke v. Smith*<sup>63</sup> three of the Lords of Appeal (Lord Hailsham of St Marylebone LC, Lord Simon of Glaisdale and Lord Brandon of Oakbrook)<sup>64</sup> invoked public policy as an alternative reason for withholding recognition from a Belgian nullity decree. This case constituted what one may suppose was the final stage in litigation which had spread over more than a decade. The facts giving rise to, and the course of, the litigation in so far as they were relevant to the decision were as follows. In 1954 the petitioner, a woman domiciled in Belgium, went through a ceremony of marriage in England with a domiciled Englishman named Smith. The sole purpose of this marriage was to enable the petitioner to acquire British nationality and thus to be able to practise her profession of prostitute without running the risk of deportation. The parties to the marriage had no intention of living together and did not do so. Eleven years later the petitioner, having taken early retirement from prostitution, went to Italy to live with a man, E. Messina. In 1970 Messina went through a ceremony of marriage in Italy with the petitioner, but he died a few hours later. Messina died leaving a considerable amount of immovable property situated in England, and the petitioner wished to claim this as his widow. In June 1970 she obtained a declaration of nullity in respect of her prior marriage to Smith on the ground of lack of consent on her part. However, before this decree was made absolute, S. Messina (E. Messina's brother) and the Queen's Proctor having intervened, Ormrod J set aside the decree nisi and declared the marriage valid.<sup>65</sup> Subsequently the petitioner sought and obtained a decree of nullity in Belgium. The Belgian courts held that the petitioner had never intended to contract a genuine or real marriage with Smith and that such a fake or sham marriage could not be treated as valid. The Court of Appeal in Ghent held that capacity to marry is governed by the personal law of each party, which in the case of the petitioner was Belgian law as the law of her nationality. By that law she lacked capacity. The marriage was therefore void *ab initio*.<sup>66</sup> The petitioner then proceeded to petition the

<sup>63</sup> [1983] 1 AC 145.

<sup>64</sup> Lord Diplock (with whom the fifth Lord of Appeal, Lord Keith of Kinkel, agreed), although confining his judgment to other grounds, did expressly disclaim any expression of opinion that Lord Hailsham's reasoning in relation to public policy was incorrect.

<sup>65</sup> *Messina (formerly Smith orse. Vervaeke) v. Smith (Messina intervening)*, [1971] P 311.

<sup>66</sup> See translation of excerpts from the Belgian judgment quoted by Waterhouse J in his judgment at the High Court hearing in the present proceedings: [1981] Fam. 77 at p. 88.

English High Court for a declaration that the Belgian decree was entitled to recognition. A further petition was later filed praying for a declaration that the marriage to Messina was valid. Waterhouse J dismissed both petitions, and the Court of Appeal dismissed the petitioner's appeal.<sup>67</sup> The House of Lords dismissed her further appeal for reasons which involved invoking the doctrine of *res judicata* and reliance upon public policy. The House was unanimous in holding that the proceedings came within the doctrine of estoppel *per res judicatam* and that the earlier judgment of Ormrod J had concluded the matter so far as English courts are concerned. But it is the alternative resort to public policy, explicitly relied upon by three members of the House, that has direct bearing upon the matters now under discussion, for the circumstances of *Vervaeke v. Smith* would not appear to fit easily, or indeed at all, into either of the frameworks within which public policy has traditionally operated. It would be hard to contend that the Belgian court in refusing to give validity to a 'sham' marriage was applying a rule so intrinsically repugnant that it could in no circumstances be applied or recognized in England. Again, any suggestion that recognition of the Belgian judgment would have tended to jeopardize good relations between the United Kingdom and either Belgium or Italy (where the judgment would apparently be recognized) would be palpably insupportable. Indeed it could be plausibly argued that the reverse is so. Non-recognition of the decree of a jurisdictionally competent court sitting in a friendly country would, if anything, be more, not less, likely to jeopardize the United Kingdom's relations with that country than would recognition.

The somewhat diffuse reasons which underlay the invocation of the doctrine of public policy in *Vervaeke v. Smith* were expounded in the judgments of the Lord Chancellor and of Lord Simon. In each judgment focus is largely directed not to the content, as such, of the rule or rules of law applied in the Belgian courts, but primarily to the impact of their application (as seen from the point of view of an English *forum*) in the circumstances of the instant case. In this context one of the factors which clearly influenced their Lordships was the behaviour of the appellant at earlier stages of the litigation. Lord Hailsham said:

Contrary to the view of the Court of Appeal and Waterhouse J, although I agree with them in seeing nothing offensive or unjust as between the parties in the doctrine of public policy propounded by the Belgian courts, I am of the opinion that the law of England . . . at least in the present case takes the case outside the rules for the recognition of foreign, and, in particular, Belgian, decrees, that is at least as regards a marriage celebrated in England between a British national and an alien for an extraneous purpose of the kind contemplated by the parties in the present case, viz. using the marriage as a vehicle for conferring British nationality on the alien partner so as to save her from deportation after conviction for criminal offences.<sup>68</sup>

<sup>67</sup> [1981] Fam. 77, 118 ff.

<sup>68</sup> [1983] 1 AC 145, 156-7.

It is the present writer's submission with all respect that if one goes beyond consideration of the intrinsic nature of a suspect rule of law and considers, in addition or instead, the effect of its application or recognition in an instant fact situation, in order to justify its exclusion on the grounds of public policy—although one may mask what one is doing by re-defining the rule narrowly so as precisely and deliberately to produce a desired result in the instant case—one is in substance embarking upon the exercise of an unstructured discretion.<sup>69</sup>

It has been suggested earlier that the role of public policy in private international law might be more satisfactorily defined if it were to be acknowledged that there is a separate category of foreign laws which a *forum* may regard with a degree of distaste that warrants, not total rejection, but simply limitation upon their acceptance to cases in which the facts are in all significant respects purely domestic to the foreign country in question. Such a relaxation would, of course, not only in principle but also in practice be quite different from an approach which permits avoidance of a foreign law on public policy grounds, even though that law is not regarded as being intrinsically even marginally distasteful, and even though the fact of its recognition or enforcement would not be detrimental to national interests. This latter approach could allow *forum* notions of public policy even greater scope in the international sphere than is allowed to it in the domestic sphere. Resort to public policy involves refusal to apply an otherwise applicable rule of law. There is a danger that a feeling may be engendered that departure from a *forum*'s own choice of law or recognition rule is in some way less radical (and therefore more acceptable) than is departure from a rule of the *forum*'s domestic law. Whereas, of course, the contrary should be the case: a *forum* should be more, not less, reluctant to impose its own national policy attitudes and criteria in a factually international context than it is in a factually national context.

Once it is accepted that a rule of private international law, a rule of the *lex causae*, or a decision reached by a jurisdictionally competent foreign court can be discarded as a matter of 'public policy' simply in order to achieve what by *forum* criteria appears to be a just result in a particular case, the gate is opened wide through which the proverbial unruly (but locally bred) horse can pass so as to wreak havoc in international pastures. In English private international law most of the manifestations of this

<sup>69</sup> It is perhaps sobering to reflect that not only did the unanimous holding of their Lordships on the *res judicata* point render reference to public policy unnecessary, but *Vervaeke v. Smith* could also, it is submitted, have been decided on a different ground, had the opportunity been taken to clarify an aspect of the general law relating to the recognition of foreign nullity decrees. In *Vervaeke v. Smith* the marriage to Smith was valid at its inception in accordance with English private international law criteria. In these circumstances to hold that it was subsequently annulled by a foreign court of competent jurisdiction ought not to have involved holding, too, that the court's decree had retroactive effect—even if it purported to do so. It is one thing for a *forum* to accept that such a decree can terminate a valid marriage, but it would be quite another to hold that the *forum* must also accept the negating of its own choice of law rules governing the original validity of marriage. Shorn of retroactive effect the Belgian decree would not have validated the marriage to Messina.

relatively recent tendency to inflate the role of public policy and to see it as sometimes little more than a vehicle for the exercise of an ill-defined or undefined discretion have so far been in the area of family law.<sup>70</sup> An outbreak of insular palm tree justice is, however, not to be viewed with equanimity in any branch of private international law. The ultimate remedy must largely lie in a combination of judicial restraint with a constant striving to bring about marked improvement in the detail and the sophistication of the rules of private international law themselves.

<sup>70</sup> But see *dicta* of Slade J in *Winkworth v. Christie, Manson and Woods*, [1980] Ch. 496, a case concerned with the *inter vivos* transfer of movable property.

See, too, the Foreign Limitation Periods Act 1984, which provides that in English private international law all matters of limitation of actions and prescription shall usually be determined by reference to the *lex causae*. Section 2 (1) introduces a general public policy reservation, but section 2 (2) goes on to prescribe specifically that the application of the *lex causae* 'shall [*sic*] conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be, a party to the action or proceedings'.



# THE CONCEPT OF NATURAL PROLONGATION IN THE JURISPRUDENCE CONCERNING DELIMITATION OF CONTINENTAL SHELF AREAS\*

By D. N. HUTCHINSON<sup>1</sup>

## I. INTRODUCTION

THE concept of 'natural prolongation' was first given currency by the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases of 1969.<sup>2</sup> Since then it has been widely used in State practice, academic writings, and now in the United Nations Convention on the Law of the Sea.<sup>3</sup> It has also been the subject of comment by international tribunals in the *Anglo-French* case<sup>4</sup> and, most recently, the *Tunisia-Libya* case.<sup>5</sup>

The purpose of this article is to examine the usage of this concept in the international jurisprudence. It will attempt to show that the tribunals have used 'natural prolongation' in several distinct senses to perform differing functions. It is believed that these different senses can only be discovered, and their significance appreciated, in the light of an exposition of delimitatory law in general. Consequently, this article will construct a rational framework for the law of continental-shelf delimitation on the basis of the three cases decided at the time of writing, and will examine how the tribunals have used 'natural prolongation' within this framework.

## II. THE APPROACH TO INTERPRETATION

### (a) *The Interpretative Rule*

The interpretation of the cases is by no means straightforward. The language of the majority judgments is often mysterious and the reasoning elliptical. The reader must then try to construct the most likely explanation of the tribunal's thinking. Such an exercise is naturally influenced by the interpretative approach adopted. Consequently, it is necessary to

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<sup>2</sup> *North Sea Continental Shelf* cases (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), *ICJ Reports*, 1969, p. 3.

<sup>3</sup> United Nations Convention on the Law of the Sea, Montego Bay, 1982: Article 76 (1).

<sup>4</sup> *Arbitration between the United Kingdom of Great Britain and Northern Ireland and the French Republic on the Delimitation of the Continental Shelf*, Cmnd. 7438 (HMSO, 1979).

<sup>5</sup> *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *ICJ Reports*, 1982, p. 17.

explain the rules of textual interpretation which have been used in this article.

First, it is desirable to establish a fundamental distinction between, on the one hand, norms which confer title to maritime expanses, and, on the other hand, norms which delimit marine areas under the jurisdiction of different States. This dichotomy is derived from a distinction between the reasons justifying these norms: there is a set of reasons behind the former norms, and a certain set for the latter, and there is no necessary identity between the two sets. For example, economic reasons may lie behind entitlement as such, whilst simplicity, ease of ascertainment and so on, may be behind the relevant delimitatory rules. Thus, in the *Tunisia-Libya* case, the International Court makes a clear distinction between 'a principle which affords the justification for the appurtenance of an area to a State and a rule for determining the extent and limits of such an area'.<sup>6</sup> The same distinction can be found in the *North Sea* cases.<sup>7</sup>

Secondly, it must be established that it is also necessary that the delimitatory norms, through the practical effects which they bring about, should not seriously conflict with or negate the reasons for which the norm which confers title was adopted by the international community. This idea finds expression in the *North Sea* cases. For the Court, in discussing the delimitatory principle of 'closest proximity', states it to be of great importance in the delimitation of territorial waters because of a 'direct correlation' between the idea and the 'sovereign jurisdiction' of the coastal State over the water column and sea-bed.<sup>8</sup> Judge Tanaka seems to use the same reasoning to justify his preference for delimitation according to the equidistance method; for he states that 'delimitation itself and delimitation by the equidistance principle serve to realize the aims and purposes of the continental shelf as a legal institution'.<sup>9</sup> Moreover, the Court in the *Tunisia-Libya* case declares that 'the principles and rules of international law which may be applied for the delimitation of the continental shelf areas must be derived from the concept of the continental shelf, as understood in international law'.<sup>10</sup>

Therefore, it may be expected that the delimitatory norms in the law of the continental shelf will be based, *at least partly*, on respect for, and possibly on furtherance of, the reasons behind the rule which confers title. This will be adopted as an elementary rule of construction.

### (b) *Natural Prolongation as the Basis of Title*

Given this rule of interpretation, it is in point to give a brief summary of the reasons which serve to justify the sovereign rights which the coastal State possesses over the sea-bed 'adjacent' to its coast for the purpose of exploring it and exploiting its natural resources.

<sup>6</sup> Para. 44; see also para. 73.

<sup>8</sup> Para. 59.

<sup>9</sup> Ibid., p. 181.

<sup>7</sup> Para. 46.

<sup>10</sup> Para. 36.

Technical advances in the years preceding the Second World War made possible, practically everywhere in the world, the exploration and the exploitation of the resources of the bed and the subsoil of the shallow coastal seas—primarily deposits of hydrocarbons. There was thus presented the prospect of a considerable supply of vital raw materials for a very long time to come. They would inure directly to the benefit of whoever harvested them and whichever government administered and taxed this activity; furthermore, the supply would ‘benefit all mankind’.<sup>11</sup> However, it was widely felt that there were various dangers involved: international conflict; irrational and wasteful exploitation;<sup>12</sup> the possibility that the technologically advanced States would reap all the immediate financial benefits. As a result, opinion formed in support of a rule conferring exclusive jurisdiction *ipso facto* and *ab initio* over resource-related activities in the areas of sea-bed off the coast of a given State on that State.<sup>13</sup>

First, it was thought that this was the best way to avoid international conflict. Exclusive national jurisdiction would protect the coastal State against unregulated and unsupervised foreign activities off its coasts constituting potential threats to its security.<sup>14</sup> It would also, through its inherence, avoid the potential for conflict involved in a system of unregulated freedom of exploitation or of occupation: conflicting claims, dual exploitation, ‘squatting’ and so on.<sup>15</sup> Secondly, such a system would be conducive to rational exploitation, for coastal State jurisdiction provides a basis for the sound management of exploitation activities.<sup>16</sup> Coastal co-operation and facilities are required for the most efficient exploitation of the sea-bed near a given State; and so it would be sensible to confer control over the whole operation on the coastal State to avoid the inefficiency inherent in a multitude of regulatory agencies.<sup>17</sup> Furthermore, deposits under the sea often constitute an extension seawards of land-based deposits, and rational exploitation would be facilitated if the deposit were under one authority.<sup>18</sup> Thirdly, and perhaps most importantly, a solution based on coastal State jurisdiction offered almost all States political advantages, as the speed with which the Latin-American and Gulf States followed the United States’ lead in claiming continental-shelf zones indicates.<sup>19</sup> For all coastal States were assured of a fair amount of

<sup>11</sup> The Truman Proclamation on the Continental Shelf, para. 1. Also Judge Bustamante y Rivero in the *North Sea* cases at para. 2 on p. 57.

<sup>12</sup> Truman Proclamation, para. 2: ‘conserving and prudently utilising’.

<sup>13</sup> *North Sea* cases, para. 19; Geneva Convention on the Continental Shelf, Article 2.

<sup>14</sup> Truman Proclamation, para. 4; Judge Jiménez de Aréchaga in the *Tunisia-Libya* case at paras. 71–2.

<sup>15</sup> *Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi* (1951), 18 ILR 144, at p. 156.

<sup>16</sup> Hollick, *U.S. Foreign Policy and the Law of the Sea* (1981), p. 372.

<sup>17</sup> Truman Proclamation, para. 4; Judge Jessup in the *North Sea* cases at pp. 67–8; Judge Jiménez de Aréchaga in the *Tunisia-Libya* case at para. 75.

<sup>18</sup> Truman Proclamation, para. 4; McDougal and Burke, *The Public Order of the Oceans* (1962), p. 633, esp. note 214.

<sup>19</sup> Hollick, loc. cit. above (n. 16).

sea-bed and the prospect of considerable natural wealth, the poorer States being protected against the danger of the technologically advanced States reaping all the immediate financial benefits from the shelf deposits.<sup>20</sup> Several Latin-American States found in it a useful prop for their claims to large fisheries zones.<sup>21</sup> Furthermore, control over the sea-bed off the coast provided States with a general political power in the event of unforeseeable world developments.

These then are the reasons which seem to have persuaded the international community to recognize the rights of a coastal State over the sea-bed off its coasts. These reasons also explain why coastal State rights are limited to resource-related purposes. However, certain 'key' passages in the jurisprudence seem to contradict this reasoning. These passages seem to suggest that States are entitled to the sea-bed off their coasts—that is, the *legal* continental shelf—not because of the reasons enumerated above, but because these areas constitute the *scientific* continental shelf of the mainland territory: because an area of sea-bed is, geomorphologically, a prolongation of the mainland territory of a State, or is one with it geologically, that area is the legal continental shelf of that State. In the domain of the law, the term 'continental shelf' is used in a special legal sense, referring to the area of sea-bed over which coastal State rights are recognized by international law. It is perfectly possible that the legal shelf refers to an area of sea-bed in no way coextensive with the physical phenomenon; but these passages seem to suggest that the two are closely tied together, since the physical shelf justifies title to the legal shelf.

Thus, in the *North Sea* cases, the International Court states:<sup>22</sup>

[w]hat confers the *ipso iure* title which international law attributes to the coastal State in respect of the continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.

Similarly, in a context which seems to indicate that it is using the term in a scientific sense,<sup>23</sup> the Court in the *Tunisia-Libya* case affirms 'the principle that natural prolongation is the sole basis of title'.<sup>24</sup>

However, a closer examination of the jurisprudence refutes this analysis. For, in the *Tunisia-Libya* case, the International Court explicitly states that title to sea-bed areas off the coast is not tied to the existence of a physical, or scientific, continental shelf, which would surely be the case if

<sup>20</sup> Judge Jiménez de Aréchaga in the *Tunisia-Libya* case at para. 70: 'it prevented a rush and grab for seabed resources being undertaken by a few States on the basis of the Grotian dogma of "freedom of the seas"'. See also Hollick, *op. cit.* above (p. 135 n. 16), p. 35.

<sup>21</sup> Hollick, *op. cit.* above (p. 135 n. 16), pp. 67-80, and 117-18.

<sup>22</sup> Para. 43; see also paras. 19, 20, 39 and 40.

<sup>23</sup> It is replying to the Libyan argument that to ascertain the geological prolongation of a State is decisive of the delimitation.

<sup>24</sup> Para. 48; also paras. 43, 47 and 67; see the Truman Proclamation, para. 4.

title is justified by such physical prolongation or geological unity. Indeed, the Court contemplates continental-shelf jurisdiction over areas of seabed which are not continental shelf in any scientific sense of the word.<sup>25</sup> Thus the Court observes that the legal idea of the continental shelf, 'while it derived from the natural phenomenon, pursued its own development', and that there is a 'lack of identity between the legal concept of the continental shelf and the physical phenomenon known to geographers by that name'.<sup>26</sup> This 'divorce'<sup>27</sup> of the scientific and the legal shelf is said to have been established by the Convention on the Continental Shelf of 1958, and, specifically, by the 'criterion of exploitability for determining the seaward extent of shelf rights'.<sup>28</sup> (This is technically indisputable,<sup>29</sup> although the Court arguably exaggerates the extent of the divorce at that stage in the history of the regime.<sup>30</sup>) The Court seems to regard the accepted trends at the Third United Nations Conference on the Law of the Sea as confirming this divorce, since, according to the resulting Convention, the 'distance of 200 nautical miles is in certain circumstances the basis of the title of the coastal State', although there may be no continental margin at all at that distance.<sup>31</sup> (Arguably, this is more in the way of a radical new departure.) As a matter of internal consistency, the Court consequently cannot mean, in the passages cited in the preceding paragraph, that the physical shelf is the basis of coastal State jurisdiction: at the very most, geological natural prolongation is 'the justification of continental shelf rights *in some cases*' only, as the Court itself says.<sup>32</sup>

What then is to be made of the passages cited above? Natural prolongation is said in the *Tunisia-Libya* case to be the 'sole basis of title', but also the basis of title 'in some cases only'! The explanation would seem to be that natural prolongation, when used in the sense of *the* basis of title, does not refer to a physical or a scientific idea, since physical prolongation is not the basis, or the justification, of continental-shelf jurisdiction; for there need be no physical prolongation in a certain area, yet there may be a legal shelf. Rather, as Decaux stresses,<sup>33</sup> it is *juridical* natural prolongation that is the basis of legal title; and the Court itself remarks that the 'adjacency of the sea-bed to the territory of the coastal State has been the paramount

<sup>25</sup> Para. 41. Judge Jiménez de Aréchaga declares: 'the concept of continental shelf as defined by the applicable rules of international law, is not determined by the facts of "natural prolongation" as they have been understood and alleged by the parties': para. 39.

<sup>26</sup> Para. 42.

<sup>27</sup> Judge Jiménez de Aréchaga, para. 40.

<sup>28</sup> Para. 41.

<sup>29</sup> e.g. *Yearbook of the International Law Commission*, 1950, vol. 1, pp. 223, 275; *ibid.* 1956, vol. 2, pp. 296-7 (commentary on draft Article 67).

<sup>30</sup> Cf. Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 227-8.

<sup>31</sup> Para. 48. The Court's discussion is obscure. It sees Article 76 (1) of the Convention on the Law of the Sea, 1982, as a departure from geologically defined natural prolongation as the sole basis of legal title at para. 48; yet it has already argued that this was never the case at paras. 41-4. Judge Jiménez de Aréchaga says that Article 76 (1) 'definitively severs' any relationship between the legal and the geological shelves at para. 51 of his judgment.

<sup>32</sup> Para. 44 (emphasis added); perhaps also para. 48—'a basis of . . . legal title'—though the non-authentic French text reads '*la base*' (emphasis added).

<sup>33</sup> *Annuaire français de droit international*, 28 (1982), p. 357 at pp. 368-9.

criterion in determining the legal status' thereof.<sup>34</sup> On the other hand, as the Court explains, natural prolongation in a physical sense is employed to 'define, in general terms, the physical object or location of the rights of the coastal State'.<sup>35</sup> It is thus descriptive rather than normative.

It is possible to contend, as does Zoller,<sup>36</sup> that the Court in the *Tunisia-Libya* case endorsed a new conception of the continental shelf and, concomitantly, of natural prolongation, totally different from that which was espoused by the International Court in the *North Sea* cases. However, this is not necessarily the case. For the separation of the legal and the physical shelf was regarded in the *Tunisia-Libya* case as having occurred early in the history of the regime. It may also be noted that, in the passage cited from the *North Sea* cases, the Court merely states that the submarine areas attributed to the coastal State 'may be deemed' to be a 'prolongation' of the land territory of the coastal State: not 'are', as would be expected if the Court is adverting to the scientific facts as the reason for coastal State jurisdiction. The idea of factual 'extension' is, therefore, of little legal relevance. There must be reasons for an assertion of title, and of a type fit to justify coastal State rights over the sea-bed off its coasts. It is submitted that the policy reasons cited above fulfil this function. 'Natural prolongation' is thus a concise way of stating these reasons and the area over which they suggest coastal State jurisdiction. So, earlier in its judgment, the Court states:<sup>37</sup>

the rights of the coastal State in respect of *the area of* continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio by virtue of* its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.

The policy reasons listed above are all arguments for the seawards extension of certain facets of territorial sovereignty.

### III. DELIMITATORY RULES

#### (a) *Is there any Delimitatory Law at all?*

For States which became parties to the Convention on the Continental Shelf of 1958, certain delimitatory law was established, whatever its character was felt to be. For States which did not ratify, or accede to, the Convention, the position was unclear until 1969. In the *North Sea* cases, the International Court of Justice stated that Article 6 thereof had not become customary law. However, the matter of delimitation between States was not legally unregulated.<sup>38</sup> First, with regard to the procedure by

<sup>34</sup> Para. 73; see also 'a particular relationship' at para. 41.

<sup>35</sup> Para. 43.

<sup>36</sup> *Revue générale de droit international public*, 86 (1982), p. 645 at pp. 651, 654.

<sup>37</sup> Para. 19 (emphasis added).

<sup>38</sup> Para. 83.

which the issue of delimitation is to be settled, the Court says that 'delimitation must be the object of agreement between the States concerned'.<sup>39</sup> Unilateral delimitation is, therefore, rejected.<sup>40</sup> Rather, there is a duty to negotiate in good faith towards an agreement, and to use the other methods available for the peaceful settlement of disputes. This does not provide an answer to the question of how to determine the substantive rights of the parties—that is, of what norms are to guide the parties in determining how to delimit the boundary between their respective jurisdictions. However, the Court denies that the matter is left to the 'unfettered appreciation of the parties'.<sup>41</sup> Concomitantly, if the negotiations fail and the matter is referred to a tribunal, then the tribunal does not decide *ex aequo et bono*.<sup>42</sup> Rather, the parties, and the tribunal, are guided by certain norms referred to as 'equitable principles'.<sup>43</sup>

(b) *What is the Nature of this Law?*

1. *Rules and principles*

The distinction between rules and principles is well established in legal theory, and it can in turn be found in the jurisprudence of continental-shelf delimitation. Thus, in the *North Sea* cases, the Court opposes 'rules' and 'principles'. It is said that there exist certain principles, but that these must be applied within the parameters set by certain 'ideas', or rules, as the context shows them to be—the listed 'ideas' are 'obligations', 'actual rules of law'.<sup>44</sup> This important distinction will be returned to below.<sup>45</sup>

Applying this distinction, it can be seen that the injunction that States should negotiate towards an agreement is, indeed, a rule. Similarly, the norm enjoining negotiating States to be guided by 'equitable principles' may be seen to be a rule. Thus, in noting these two prescriptions, the International Court states: 'actual rules of law are here involved . . . rules binding upon States for all delimitations'.<sup>46</sup>

The content of the second rule—the rule that governs the substantive issue of delimitation—seems to be a set of principles. If the substantive law of delimitation is indeed a set of principles, rather than a rule or a set of rules, then the delimitatory solution will not simply be dictated in an 'all or nothing way'. The decision-maker has a greater task of appreciation. For there are several principles, each pulling in favour of a particular solution, and, whenever and wherever they conflict, the decision-maker must weigh them and balance them against each other to find the delimitatory

<sup>39</sup> Para. 85.

<sup>40</sup> Thus, in the *Tunisia-Libya* case, the Court rejects certain proposed boundaries which had been drawn for various purposes by one or the other of the parties because they were established by unilateral action only and were not the subject of agreement between the States concerned: paras. 87, 90 and 92.

<sup>41</sup> Para. 83.

<sup>42</sup> Para. 88.

<sup>43</sup> Para. 85; see also para. 55.

<sup>44</sup> Para. 85; with regard to the idea of parameters, note 'in accordance with', rendered as 'conformément' in the French translation.

<sup>45</sup> See section IV (A).

<sup>46</sup> *North Sea* cases, para. 85.

solution. Thus, in the *Tunisia-Libya* case, the International Court affirms that 'it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result'.<sup>47</sup>

## 2. *Principles and methods*

Another important distinction which must be made is between equitable principles and methods of delimitation. A consideration of the equitable principles guides the parties, or the tribunal, to an equitable solution of where to draw the boundary. However, a line must be drawn, and, in cartographic terms, the solution suggested by a consideration of the equitable principles is vague and imprecise. Thus, in the *Tunisia-Libya* case, the Court decides that the boundary approximately 26° East of North which it has proposed in the first sector must change direction to take account of the change in the direction of the Tunisian coast; but the Court proceeds to state that where this change occurs, and therefore at what point the 26° line should be modified, is not capable of objective determination.<sup>48</sup> And this imprecision is just what one would expect, given that 'it is clear that no rigid rules exist as to the exact weight to be attached to each element in the case'.<sup>49</sup> The equitable principles, therefore, serve to create parameters within which an equitable line may be drawn, a type of legitimate delimitatory zone, as it were.<sup>50</sup> The actual drawing of the boundary line will be effected according to a certain method of delimitation. There are various methods of delimitation, such as equidistance, azimuth, prolongation of the land boundary, a perpendicular to the general direction of the coast, and so on. They are all practical ways of drawing lines on the basis of certain cartographic features. In each case the method chosen will be the one which produces a line consistent with the result set by the equitable principles—within the parameters. Methods are, therefore, subordinate to principles. Thus, in the *Tunisia-Libya* case, the International Court says that the method of equidistance 'may be applied if it leads to an equitable solution; if not, other methods should be employed'.<sup>51</sup> In the language of the *compromis* in that case, the method is 'the practical way in which the . . . principles and rules apply in this particular situation'.<sup>52</sup>

Nevertheless, the dichotomy between substantive norms of delimitation and the practical means of giving expression to them is not absolute; for it is clear that the method chosen has certain substantive effects. This follows, first, from the fact that the principles prescribe only a vague solution which the method resolves into a precise line. Secondly, several methods may all provide possible solutions within the parameters set by

<sup>47</sup> Para. 71.

<sup>48</sup> Para. 123.

<sup>49</sup> Para. 71.

<sup>50</sup> Cf. UN Convention on the Law of the Sea, Article 76; cf. also Hedberg, *Virginia Journal of International Law*, 17 (1976), pp. 57-75.

<sup>51</sup> Para. 109.

<sup>52</sup> Para. 108: this is the Tunisian translation.

the equitable principles. In the *Tunisia-Libya* case, the Court remarks that 'several methods may be applied to one and the same delimitation';<sup>53</sup> indeed, a perpendicular to the general direction of the coast and a line connecting the boundaries of the concessions granted by the two parties were candidates in that case. If there is such a choice, then it will affect the relative amounts of sea-bed received by the parties. Thirdly, what appears to be one method may itself produce differing results according to the scale of the map used, whether account is taken of the curvature of the earth,<sup>54</sup> and so on.

There is another observation which must be made with regard to the relationship between principles and methods. Although there is a clear juridical distinction between the two—the former legally determining the solution, and the latter cartographically translating that solution into a line on the map—there seems to be an intrinsic connection between certain principles and certain methods. This is only rational. For if each principle suggests the delimiting of the boundary according to a certain consideration and in a certain place, then it is only to be expected that there should be a method corresponding to that principle and giving practical expression to it. Thus, in the *North Sea* cases, the International Court talked of the principle of 'closest proximity' which received practical expression through the method of equidistance.<sup>55</sup>

### (c) *Is there a Single Rule of Delimitation?*

Despite the express statement of the International Court, attempts have been made to argue that the delimitation of the continental shelf is not governed by equitable principles, but by a single rule, albeit with certain ill-defined exceptions.

#### 1. *Equidistance as a rule of delimitation*

The strongest argument for the existence of a single substantive delimitatory rule is the one which was made by Denmark and the Netherlands in the *North Sea* cases: that is, that there is a rule which makes compulsory the use of the equidistance method. This argument is based upon the proposition that the principle of 'closest proximity' alone reflects the very rationale of the continental-shelf regime.<sup>56</sup> In addition, as a delimitatory method, equidistance is said to have considerable attraction, as the Court noted in the *North Sea* cases.<sup>57</sup> It is convenient and simple to

<sup>53</sup> Para. 111; Tunisia similarly envisaged that the practical application of the delimitatory law might leave room for a choice of method: para. 27.

<sup>54</sup> See esp. the second *Anglo-French* case.

<sup>55</sup> Paras. 40 and 44.

<sup>56</sup> Ibid., para. 57; see also the *Anglo-French* case, para. 182.

<sup>57</sup> Paras. 22-3.

use; it can be applied in any situation; and it has been used to delimit other maritime zones.<sup>58</sup>

However, the International Court rejected the joint Danish-Dutch argument. The contention of inherence is refuted by the fact that the International Law Commission only adopted equidistance well on in its discussions, and then with grave doubts as to its efficacy and fairness. Furthermore, the decisions of the international tribunals show that equidistance may produce results which conflict with the very rationale of the continental-shelf regime, and thus it is overridden. An equidistance line, in certain circumstances, will cause the continental shelf of one State to lie in front of the coast of another State, cutting it off from areas directly before its coastal front, as is noted in the *North Sea* cases.<sup>59</sup> Judge *ad hoc* Jiménez de Aréchaga explains that, amongst other things, this would adversely affect the security interests of the latter State; and, for that reason, he rejects an equidistance solution in the *Tunisia-Libya* case.<sup>60</sup> Moreover, and of especial significance, in certain circumstances equidistance will cause States to receive non-comparable areas of the sea-bed in a given area—a division not being made equally, unit for unit of coastline—thus disappointing the expectations of certain coastal States and rendering the delimitation unacceptable. This is what equidistance on its own would have achieved in the *North Sea* cases, and in the Channel Islands sector in the *Anglo-French* case.<sup>61</sup>

The tribunals have, therefore, rejected the idea that equidistance constitutes a single substantive delimitatory rule, or that it constitutes a rule at all.<sup>62</sup> Indeed, the International Court in the *Tunisia-Libya* case declares that, not only is equidistance 'not . . . a mandatory legal principle', but it does not possess any 'privileged status in relation to other methods [of delimitation]'.<sup>63</sup> The Court is under no duty to consider it first and only to consider other delimitatory solutions if it should prove unsuitable. Thus, in the *Tunisia-Libya* case, the Court found a solution apart from equidistance, and so did not consider equidistance in any depth.<sup>64</sup>

Furthermore, this has been held to be the case in conventional law, as well as in customary law. For the Court of Arbitration in the *Anglo-French* case concludes that Article 6 of the Geneva Convention on the Continental Shelf and the customary law relating to shelf delimitation are in essence identical. Article 6 is said to give 'particular expression to a general norm

<sup>58</sup> *North Sea* cases, para. 59; also the *Anglo-French* case, para. 85.

<sup>59</sup> Para. 44. The Court in the *Tunisia-Libya* case recognized the existence of such problems in the use of equidistance; for the fact that equidistance was not 'applicable' in that case—though cf. para. 126—is said to have avoided the problem of any 'cut-off' effect being created by the delimitation: para. 76.

<sup>60</sup> Para. 104, read with paras. 69–75 where the idea of 'non-encroachment' is explained.

<sup>61</sup> Also the Franco-Spanish delimitation: Rhee, *American Journal of International Law*, 75 (1981), p. 590 at p. 620.

<sup>62</sup> *North Sea* cases, para. 83.

<sup>63</sup> Para. 110; also Judge Jiménez de Aréchaga, para. 28.

<sup>64</sup> Contrast Judge Gros, para. 12.

that, failing agreement, the boundary between States abutting on the same continental shelf is to be determined on equitable principles';<sup>65</sup> and the Court then confirms that the meaning of 'equitable principles' is the same in conventional and customary law: they 'have the same object',<sup>66</sup> and any differences between the two are in 'approach and terminology rather than substance'.<sup>67</sup> It will, therefore, be assumed here that the two regimes are the same.<sup>68</sup>

Equidistance, in conclusion, is not a delimitatory rule. The greatest role that is possible for equidistance is as a method of achieving an equitable result, applicable when its practical effects are not inconsistent with the policy-goals behind the regime of the continental shelf.<sup>69</sup>

To say this is not to deny equidistance any importance whatsoever. The Court in the *North Sea* cases states that, though 'it may not necessarily be the only, nor in all circumstances the most appropriate one', the method of equidistance and the allied principle of 'closest proximity' 'may afford one of the tests to be applied and an important one in the right conditions'.<sup>70</sup> Indeed, as statements in the *North Sea* cases<sup>71</sup> and the *Anglo-French* case<sup>72</sup> indicate, it is the presumptively correct method of delimitation between opposite States; and the Court in the *Tunisia-Libya* case confirms this.<sup>73</sup>

## 2. *Geologically defined natural prolongation as a rule of delimitation*

As the International Court observes in the *North Sea* cases<sup>74</sup> and reiterates in the *Tunisia-Libya* case,<sup>75</sup> 'the institution of the continental shelf has arisen out of the recognition of a physical fact'. As a consequence, the argument has been made, notably by Libya in the *Tunisia-Libya* case, that there is but a single substantive delimitatory rule: that continental-shelf boundaries should follow the course taken by certain geomorphological and geological features which serve to point out the appurtenance of one piece of continental shelf to one State as an actual, scientific prolongation thereof, and the appurtenance of another piece to another State as its 'natural prolongation'. This rule is said to follow from the very rationale of the continental-shelf regime.

This is, however, an impossible argument to sustain, and the International Court rejects it.<sup>76</sup> As a consequence, a less absolute argument has been created to replace it, and this will be discussed below. Many arguments against the latter model also apply to the Libyan contention:

<sup>65</sup> Para. 70.

<sup>66</sup> Para. 75.

<sup>67</sup> Para. 148.

<sup>68</sup> Zoller writes that there is 'unité', 'une véritable équivalence': *Annuaire français de droit international*, 23 (1977), p. 359 at pp. 364, 376.

<sup>69</sup> See section V (a) 1. (ii), below.

<sup>70</sup> Para. 42.

<sup>71</sup> Para. 57.

<sup>72</sup> Paras. 85, 87 and 95.

<sup>73</sup> Para. 126.

<sup>74</sup> Para. 95.

<sup>75</sup> Para. 41.

<sup>76</sup> Libya probably never expected it to succeed: the argument would seem to have been a tactical one, to overwhelm the Court with scientific data and thus neutralize Tunisian arguments based on more concrete features of the sea-bed: Decaux, *Annuaire français de droit international*, 28 (1982), at p. 365.

they too will be discussed below.<sup>77</sup> For the present, suffice it to state the major arguments which go to refute the Libyan argument.

First, the effects of the application of the alleged rule would conflict with the rationale of the shelf regime, as Judge *ad hoc* Jiménez de Aréchaga points out in the *Tunisia-Libya* case.<sup>78</sup> He remarks that for the boundary to follow the crest-line of the Zira and Zuwarah ridges, as suggested by Tunisia,<sup>79</sup> would be unacceptable for the same reason that he rejects an equidistance line: the line would cut across in front of Libya's coastline, thus prejudicing Libya's security interests.<sup>80</sup> A line which slavishly follows natural features of the sea-bed might also award two States non-comparable areas of sea-bed in a given region, thus rendering the solution politically unacceptable. Indeed, the Libyans themselves recognized that their argument required some modification in order to be at all credible, and suggested that the proposed northward scientific line be diverted decently clear of the Kerkennah Islands and Ras Kaboudia.<sup>81</sup>

Secondly, geomorphology and geology are subject to widely differing interpretations. The arguments of Tunisia and Libya show this clearly; and the International Court there despairs of any clear scientific solution.<sup>82</sup> Moreover, scientific views can change radically. The Libyan argument would not have been possible until the late 1960s and the advent of 'plate tectonic' theory. If views change, or new data are discovered, delimitations could be shown to be scientifically erroneous, and world order would then be hazarded, with some States seeking to redraw boundaries whilst others stood on their established rights.

Thirdly, according to the International Court, continental-shelf jurisdiction may be exercised over areas of sea-bed which do not constitute continental platform or crust, geologically speaking.<sup>83</sup> A rule which delimits on the basis of the geomorphology and geology of the continental platform will, therefore, be gravely impaired in its operation. To prolong 'natural' boundaries in the platform seawards is not much of an answer. If there is such a boundary—and, despite much scientific evidence, none could be found in the *Jan Mayen Island* case—it may be difficult to define its direction. Furthermore, the solution falls foul of the same criticisms which led the International Law Commission to reject prolongation of the land boundary as a solution to the delimitation of the territorial sea—problems compounded as there is no exact borderline for the end of the continental margin, as there is for the waterline of the coast, the problem becoming three-dimensional as a result. In addition, distances to seawards are far greater in the case of the continental shelf than in the case of the territorial sea.

<sup>77</sup> See section IV (b).

<sup>79</sup> Judgment of the Court, para. 15, citing the Tunisian memorial, (II) (1).

<sup>80</sup> Para. 73.

<sup>82</sup> Para. 61; Judge Jiménez de Aréchaga describes the evidence as 'speculative' at para. 38. See also the *Jan Mayen Island* case (*Iceland v. Norway*), *International Legal Materials*, 20 (1981), p. 797.

<sup>83</sup> See pp. 136-7, above.

<sup>78</sup> Paras. 69-75.

<sup>81</sup> Para. 62.

Thus the whole thrust of the International Court's reasoning in the *Tunisia-Libya* case is to reject the idea that ascertainment of the respective geological natural prolongations of the delimiting States is the single and absolute rule of continental-shelf delimitation.<sup>84</sup> For, 'while the [geologically defined] idea of the natural prolongation of the land territory defined, in general terms, the physical object or location of the rights of the coastal State, it would not necessarily be sufficient, or even appropriate, in itself to determine the precise extent of the rights of one State in relation to those of a neighbouring State'.<sup>85</sup>

There is not, therefore, nor can there be, such a rule of delimitation, single and absolute, operating on its own. Rather, as the International Court affirms, 'the satisfaction of equitable principles is, in the delimitation process, of cardinal importance'.<sup>86</sup> There is, however, a potential role for geologically defined natural prolongation as a delimitatory norm when its effects in practice are not inconsistent with the rationale of continental-shelf jurisdiction. What role it has in fact been given in the jurisprudence will be discussed below.<sup>87</sup>

#### IV. DELIMITATORY PRINCIPLES

The international tribunals have stated, from the first, that there is no one rule of delimitation, providing one method of drawing a boundary line:

current legal thinking . . . remained governed to the end by two beliefs;—namely, first, that no single method of delimitation was likely to prove satisfactory in all circumstances, and that delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and secondly, that it should be effected on equitable principles.<sup>88</sup>

Yet, despite these utterances, the International Court in the *North Sea* cases does seem to state the existence of a single rule of delimitation! For, in a 'key' passage, the Court suggests a basic rule that is 'determinant': that the sea-bed areas over which the coastal States parties to a delimitatory negotiation or arbitration receive their respective sovereign rights must constitute the most 'natural prolongation of the land territory' of each State as against the other.<sup>89</sup> This concept is later reiterated as one of 'the ideas which have always underlain the development of the legal regime of the continental shelf in this field', one of the 'rules binding upon States for all delimitations', after the duty to negotiate and the duty to be guided therein by equitable principles.<sup>90</sup> It is stated once more as a 'principle and

<sup>84</sup> See paras. 40-4.

<sup>85</sup> Ibid., para. 43: a similar opposition is made in para. 44.

<sup>86</sup> *Tunisia-Libya* case, para. 44.

<sup>87</sup> See sections IV (b) and V (b) below.

<sup>88</sup> *North Sea* cases, para. 55; see also *ibid.*, para. 83, and *Tunisia-Libya* case, para. 111.

<sup>89</sup> Para. 43.

<sup>90</sup> Ibid., para. 85.

rule of international law' in the *dispositif*;<sup>91</sup> and the Court of Arbitration reaffirms it in the *Anglo-French* case.<sup>92</sup> How are these apparently very important passages to be explained?

(a) *The Model of Principles: Natural Prolongation as Result*

In searching for a meaning for the idea of natural prolongation, a major problem is that, in the *North Sea* cases, where it is initially used, the concept receives no definition as such. This is perplexing if the concept is a fundamental rule of delimitation. The term is, moreover, very open-ended and susceptible to a variety of interpretations.<sup>93</sup> For instance, wide-margin States, such as Canada, seized on it and used it, quite outside the context of delimitation with other States, to support their claims that the *outer limits* of the legal continental shelf extended as far seaward as the very toe of the continental margin, thus giving the term an exclusively geomorphic and geological interpretation.<sup>94</sup>

Nevertheless, it would be misleading to say that no indication as to its meaning can be found. For, to begin with, if part (C) (1) of the *dispositif* is read carefully, it is possible to argue that natural prolongation does not constitute a rule guiding negotiating States to a solution. Rather, it is the statement of a result: the solution to which the negotiations are leading. In itself it tells the parties nothing; for it is not the means to reach the result, but the end. This is one possible reading of the passage:

*is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances, in such a way as to leave as much as possible to each party those parts of the continental shelf that constitute a natural prolongation of its land territory . . .*<sup>95</sup>

For 'is to be effected by' can be read so as to apply to 'agreement', 'equitable principles', and 'relevant circumstances', and so as not to cover 'natural prolongation'; 'in such a way as to' can be read so as to separate the ideas into two sets, and so as to state that an 'agreement' applying 'equitable principles' to the 'relevant circumstances' of the case leads to a result termed 'natural prolongation' (or 'most natural prolongation').

This interpretation is by no means unequivocal; for 'in such a way as to' may be purposive and instrumental. Nevertheless, it receives support from a wide variety of quarters.

First, the Court of Arbitration in the *Anglo-French* case refers to the statement of the (most) natural prolongation 'rule' in the *North Sea* cases,

<sup>91</sup> *North Sea* cases, para. 101 (C) (1).

<sup>92</sup> Para. 79.

<sup>93</sup> O'Connell, in his oral argument for Greece in the *Aegean Sea Continental Shelf* case (*Greece v. Turkey*), commented that 'subsequent speculation about the implications of the Court's judgment have however carried the notion of natural prolongation beyond what was in issue in the *North Sea Continental Shelf* case': *ICJ Pleadings*, 1980, p. 95.

<sup>94</sup> See Buzan and Middlemiss in Johnson and Zacher (ed.), *Canadian Foreign Policy and the Law of the Sea* (1977), pp. 18-19.

<sup>95</sup> *North Sea* cases, para. 101 (C) (1) (emphasis added).

and states that 'so far as delimitation is concerned, . . . this conclusion states the problem rather than solves it'.<sup>96</sup> Therefore, the Court does not see the concept as normative at all when used in this sense. It is not a delimitatory rule or principle designed to 'solve' the delimitation problem. Indeed, the Court opposes it to norms 'which are specifically directed to delimitation',<sup>97</sup> and proceeds to look for these in order to delimit the boundary in the case before it. Likewise, Grisel, writing after the *North Sea* cases, states that natural prolongation formulates the goal to be achieved, rather than the means to achieve it.<sup>98</sup>

Secondly, in the *Tunisia-Libya* case, the concept of natural prolongation is mentioned as the *raison d'être* of the continental-shelf regime, discussed in the sense of a single absolute delimitatory rule,<sup>99</sup> and may also be found in two further senses discussed below (neither of which is found to be applicable to the facts of the case);<sup>100</sup> but, beyond this, the concept does not figure at all, even in the application of the law to the facts.<sup>101</sup> This is indeed odd if the concept may be used in a sense which constitutes the fundamental rule of delimitation, as the passages cited above from the *North Sea* cases might otherwise be read to suggest. It is, however, quite consistent with the meaning suggested; for then, in this sense, it is of little directly practical use as an instrument in making a delimitation.<sup>102</sup>

Thirdly, the judgment of the International Court in the *North Sea* cases seems positively to support this interpretation. The crucial passage is paragraph 45. To begin with, the Court notes the 'fluidity', '*le caractère incertain*', of the concept of natural prolongation, which it has been discussing in paragraphs 43 and 44. Such is hardly the stuff of which fundamental delimitatory rules are made. The Court proceeds to illustrate this by applying the idea to the shelf areas off the coast of Norway, which are, for the most part, separated from the Norwegian coast by a very wide and deep trough. But the concept of natural prolongation is not applied without qualification: it is applied 'in [a] physical sense'—or, as the French text reads, to 'zones' '*considérées au point de vue géographique*'. Thus natural prolongation is seen not to be a single idea or rule. Rather, it can be interpreted in many senses, or seen from many '*points de vue*'. It is, therefore, which 'aspect' of it that is looked at, what 'sense' it is seen in, from which '*point de vue*' it is examined, that is decisive. Each of these

<sup>96</sup> Para. 79; similarly, in discussing the solution for the Channel Islands region proposed by the French, the Court remarks that 'this explanation . . . that the natural prolongation of France's mainland in some way turns around the Channel Islands, *simply states the result* which would follow from the Court's acceptance of the French Republic's claim': para. 193 (emphasis added).

<sup>97</sup> Para. 79.

<sup>98</sup> *American Journal of International Law*, 64 (1970), p. 562 at p. 589.

<sup>99</sup> See section III (c) 2. above.

<sup>100</sup> See sections IV (b) and V (b) below.

<sup>101</sup> Feldman, *American Journal of International Law*, 77 (1983), p. 219 at p. 226.

<sup>102</sup> Except perhaps by way of Benthamite 'archetypation'. Cf. Brown, who writes that it would have made little difference if the Court of Arbitration in the *Anglo-French* case had not mentioned natural prolongation at all in relation to the Channel Islands region: *San Diego Law Review*, 16 (1979), p. 461 at p. 482.

different 'aspects' will suggest different results, or 'natural prolongations', for each delimiting State. The idea of 'the most natural prolongation' for each State when compared with the competing claim of another State, which is put forward in the paragraph cited above,<sup>103</sup> suggests that there is a single solution for each State. This solution will be the result of the interaction of the various 'aspects' and 'natural prolongations' relating to one delimiting State with those relating to another. '(Most) natural prolongation' is thus, once more, the statement of the result of the application of other delimitatory norms. This can be seen more clearly in the *dispositif* from the *North Sea* cases, in the section already quoted above:

delimitation is to be effected . . . in such a way as to leave *as much as possible* to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory, *without encroachment* on the natural prolongation of the land territory of another.<sup>104</sup>

On its own this solves nothing. For how, it may be asked, do we resolve this conflict of 'aspects' or 'senses'? The answer would seem to be that these senses or aspects constitute legal principles. As legal principles, they do not apply in an 'all or nothing way' like rules. For, if a certain aspect of 'natural prolongation' suggests that the State to which it relates should receive jurisdiction over a certain area of sea-bed, it does not follow automatically that the State concerned receives that area. Rather, the principle suggests that it should, and pulls in that direction, so to speak. It may, however, conflict with an 'aspect' of 'natural prolongation' relating to the other State party to the delimitation. If an 'aspect' or 'sense' is a principle, then the conflict will be resolved, at each point at which the principles conflict, by an examination of their relative weights. The weightier principle will override the lighter, and jurisdiction at that point pertain to the relevant State. The weight of a principle is governed by the extent to which it gives effect to a policy aim or value at the point in question; and, if different principles are in conflict, then also by the importance attached to the policy aims or values behind the respective principles.

There is further evidence for this model in the *North Sea* cases. For the International Court states that 'various aspects' must be 'taken into account' in deciding upon an appropriate delimitatory line.<sup>105</sup> That these 'aspects', or '*facteurs*',<sup>106</sup> are normative, and that they function as principles, is indicated by several pieces of evidence. That they are not facts is clear. For 'aspects' are themselves said to 'adapt' to the 'factual situation', and to enable the Court to 'balance' the facts of the case. Aspects are also said to constitute 'adequate bases for decisions'. Facts by themselves cannot justify legal decisions—only when given relevance and

<sup>103</sup> See p. 145.

<sup>105</sup> Para. 94.

<sup>104</sup> Para. 101 (C) (1) (emphasis added).

<sup>106</sup> French text.

value through the medium of rules and principles. A decision based purely on facts would be a decision *ex aequo et bono*. So 'aspects' are indeed shown to be norms. That they are not rules is clear; for the Court talks of 'balancing' the 'aspects' in a way appropriate to principles. The last fact that indicates that 'aspects' constitute principles is the structure of the Court's judgment. The 'aspects' which the Court proceeds to enumerate after paragraph 94 appear in the *dispositif* in section (D), where it is stated that they must be used to guide the negotiations of the parties.<sup>107</sup> Section (D) follows section (C) which lists the rules of shelf delimitation. This seems to reflect the pattern of paragraph 85. There, as has been noted,<sup>108</sup> the distinction is made between rules and principles; it is said that the principles must be applied within the parameters set by the rules; and the rules are then enumerated. These rules are reiterated in section (C) of the *dispositif*. Section (D) proceeds to list certain norms to be taken into account in the negotiations enjoined by the rule in section (C) (1). It would seem right to infer that these norms are the principles spoken of in paragraph 85.<sup>109</sup>

Secondly, this model receives powerful support from paragraphs 70 and 71 of the *Tunisia-Libya* decision. *Ex facie*, the International Court is there at odds with the submission made here. It talks of 'selecting' principles 'according to their appropriateness for reaching an equitable result'; and if, as it says, the 'equitableness' of a principle is to be 'assessed in the light of its usefulness for the purpose of arriving at an equitable result', then it would seem that what is 'equitable' is not determined by any rules or principles: rather, it is ascertained intuitively, and then various—and any—principles are selected to justify the decision *ex post facto*. Thus Zoller concludes that there are no legal rules of delimitation, so that delimitation of the continental shelf is no longer a legal operation, but rather '*une affaire d'espèce*'.<sup>110</sup> Similarly, Decaux, referring to this passage, concludes:

c'est . . . une manière de dire que la fin justifie les moyens, et de parer du terme d'équité ce qui n'est peut-être qu'une solution de compromis. Une telle démarche est d'ailleurs familière aux juges internationaux qui partent souvent du résultat à obtenir pour trouver ensuite les arguments propres à étayer ce choix.<sup>111</sup>

However, not all commentators have drawn this conclusion;<sup>112</sup> and it is submitted that this cannot be the Court's meaning. For the Court proceeds in paragraph 72 to say that the 'application of equitable principles is to be

<sup>107</sup> 'in the course of negotiations, the factors to be taken into account are . . . '.

<sup>108</sup> See p. 139, above.

<sup>109</sup> Contrast Grisel, loc. cit. above (p. 147 n. 98), who, consistently with his view that delimitation is not a justiciable question, believes the aspects listed are not substantive legal principles, but merely starting-points for negotiations: pp. 591–2.

<sup>110</sup> Loc. cit. above (p. 138 n. 36), at pp. 656, 676 and 677; see also Quéneudec, *Annuaire français de droit international* (1981), p. 203 at p. 212.

<sup>111</sup> Loc. cit. above (p. 137 n. 33), at p. 372.

<sup>112</sup> e.g. Feldman, loc. cit. above (p. 147 n. 101), at p. 220.

distinguished from a decision *ex aequo et bono*', which the operation Zoller and Decaux envisage would surely be.<sup>113</sup> Furthermore, in paragraph 71 itself, the International Court says that 'equitable principles cannot be interpreted in the abstract'; rather, the Court is 'bound to apply equitable principles *as part of international law*'.<sup>114</sup> Thus these principles are legal and constitute a closed set defined by law. The description of their behaviour given by the Court is consistent with that of principles. There are said to be no 'rigid rules' on the 'exact weight to be attached to each element in the case'; but the situation is 'very far from being an exercise of discretion or conciliation'.<sup>115</sup> This definitely appears like the operation of principles, which give varying weight to each element of fact in determining the result, depending upon their interaction. Moreover, there is mention of 'balancing up' in order to produce an 'equitable result'.

The passages in paragraph 70 which seem to gainsay this interpretation may be explained in a way consistent therewith. The language of 'selecting' principles 'according to their appropriateness for reaching an equitable result' may be read as referring to the fact that what is an equitable result is determined by the interaction of the legal principles, and that a certain principle—or certain principles—may prevail in the factual 'matrix' to dictate what is an equitable result. The result is thus 'predominant', and it may be said that 'the principles are subordinate to the goal'; for no one principle necessarily and automatically determines the result.<sup>116</sup>

(b) *Is the Operation of the Equitable Principles Automatic? Natural Prolongation as a Primary Delimitatory Rule*

There is substantial evidence from the jurisprudence that the rule enjoining the application of equitable principles described in the previous pages does not, without *any* qualification, guide the negotiations of the delimiting States. For certain parts of the judgments in the *Anglo-French* case and the *Tunisia-Libya* case seem to suggest that this rule only comes into operation upon the non-fulfilment of another norm in the nature of a rule. This rule may be termed 'primary', because of its primacy in an ordinal sequence of applicability.

This primary rule seems to be that the sea-bed which is the subject of delimitation must be examined scientifically, from a geological-cum-geomorphological point of view; and, if there is a 'marked disruption or discontinuance of the sea-bed', which constitutes an 'indisputable

<sup>113</sup> The Court had no power to make a decision *ex aequo et bono* under the *compromis*: surely a construction of the judgment should be sought which avoids this illegal interpretation.

<sup>114</sup> Emphasis added.

<sup>115</sup> Para. 71; see also para. 110, *ibid.*

<sup>116</sup> It may be noted that the Tunisian argument, cited by the Court, is to the effect that "the satisfying of equitable principles in a particular geographical situation" is part of the process of "the identification of the natural prolongation": para. 39, *ibid.*

indication of the limits of two separate continental shelves, or two separate natural prolongations', one appertaining to each State, then the delimitation must follow the line thus suggested.<sup>117</sup> If such 'distinct natural prolongations'<sup>117</sup> cannot be identified, and, scientifically speaking, there is a 'natural prolongation common to both territories', then the delimitation 'must be governed by criteria of international law other than those taken from physical features'.<sup>118</sup> Thus it is only when this rule has been operated and found not to be applicable in the instant case<sup>119</sup> that the International Court in the *Tunisia-Libya* case proceeds to expound and operate the model of equitable principles:

since the Court considers that it is bound to decide *the case* on the basis of equitable principles it must first examine what such principles entail, *divorced* from the concept of natural prolongation which has been found not to be applied for purposes of delimitation *in this case*.<sup>120</sup>

An identical primary rule may be found in the award of the Court of Arbitration in the *Anglo-French* case. The Court states that 'the problem of delimitation arises precisely because in situations where the territories of two or more States abut on a *single continuous continental shelf*, it may be said geographically to constitute a natural prolongation of the territory of each of the States concerned'.<sup>121</sup> The clear implication is that, if geologically or geomorphologically it was not a continuous area of shelf, but was 'disrupted' so as to create one shelf prolonging one State, and another prolonging the other, then the delimitation should follow this 'disruption'. This implication may be found once more at paragraph 191; and at paragraph 194 the Court states:

When the question is whether areas of continental shelf, which *geologically* may be considered a 'natural prolongation' of the territories of two States appertain to one State rather than to the other, the legal rules constituting the *juridical* concept of the continental shelf take over and determine the question.<sup>122</sup>

The 'rules' are said to come into operation once the geological delimitatory device has failed to work. It failed in that case since the Court found that there was but one geological shelf.<sup>123</sup>

The existence of this primary rule is also maintained by many writers on the continental shelf. For example, Professor Brown, in his book *The Legal Regime of Hydrospace*, rejected the relevance of geological factors to the delimitation of the continental shelf between States;<sup>124</sup> but, writing subsequently,<sup>125</sup> he felt it necessary to qualify this statement, adding that

<sup>117</sup> *Tunisia-Libya* case, para. 66.

<sup>118</sup> *Ibid.*, para. 67; para. 61 does not disprove this: it does not say that geology can never dictate the delimitation; it merely says it cannot in the circumstances of the case.

<sup>119</sup> Para. 67; see also para. 32.

<sup>120</sup> Para. 70 (emphasis added).

<sup>121</sup> Para. 79 (emphasis added).

<sup>122</sup> Emphasis added.

<sup>123</sup> Para. 2, 107, etc.

<sup>124</sup> London: Stevens (1971), p. 49.

<sup>125</sup> *Loc. cit.* above, p. 147 n. 102.

the idea of geological natural prolongation is possibly<sup>126</sup> relevant where there is a major geological discontinuity running laterally seawards from the vicinity of the termination of their land boundary at the coast in the case of adjacent States, or where there is such a discontinuity lying between their coasts in the case of opposite States.<sup>127</sup> However, he welcomes the *Anglo-French* case, which he believes helps to dispose of the fallacious idea that geological prolongation is of major relevance to the delimitation of the continental shelf.<sup>128</sup> Professor Bowett welcomes that case for similar reasons,<sup>129</sup> whilst stating that it is still possible that a trench or trough or deep might provide a boundary where it constitutes a significant break in the continuity of the shelf so as to produce different shelves on either side.<sup>130</sup> Other authors are more sanguine. Thus Blecher, although he believes that delimitation is effected by equitable principles, recognizes that these principles only come into operation if the sea-bed to be delimited can be considered as the geological prolongation of the land mass of both the parties.<sup>131</sup> Feulner similarly believes that the *North Sea* cases have placed geology very highly in the hierarchy of delimitatory criteria.<sup>132</sup>

It may be noted that there is some disagreement amongst these writers about the nature of the feature, the disruption, that is being sought. For example, Brown seems to refer to features which themselves are not juridically subject to the continental-shelf regime, thus creating two separate *legal* continental shelves;<sup>133</sup> whereas Feulner believes that the trough or channel need not be such as to terminate the geological shelf, and so itself might be subject to the shelf regime, so that there is but one legal continental shelf, albeit with a major geological disruption on it.<sup>134</sup> This issue does not seem to be resolved in the jurisprudence discussing the primary rule. However, it is clear that all these authors, and likewise the international tribunals, are looking for a major disruption in the structure of the physical continental shelf.

Natural prolongation in this sense—a primary rule—must be distinguished from natural prolongation in the sense of a single and absolute delimitatory rule based upon the identification of scientific ‘natural prolongations’.<sup>135</sup> The distinction is between, on the one hand, a rule which looks for very definite and unambiguous features creating totally separate continental shelves, one for each delimiting State, and, if it finds none, ceases to operate, leaving the delimitation to other rules and principles of law; and, on the other hand, a rule which looks for *any* features which, from a scientific point of view, point up appurtenance, and which operates

<sup>126</sup> ‘Possibly’ is used in the conclusion at pp. 483–4, *ibid.*, but not earlier at p. 477, where this thesis is expounded.

<sup>127</sup> *Ibid.*, pp. 483–4.

<sup>129</sup> *This Year Book*, 49 (1978), p. 1 at p. 16.

<sup>131</sup> *American Journal of International Law*, 73 (1979), p. 60 at p. 85.

<sup>132</sup> *Virginia Journal of International Law*, 17 (1976), p. 77 at p. 95.

<sup>133</sup> *Loc. cit.* above (p. 147 n. 102), p. 477.

<sup>134</sup> *Loc. cit.* above (n. 132), p. 95.

<sup>128</sup> *Ibid.*, p. 529.

<sup>130</sup> *Ibid.*, p. 17.

<sup>135</sup> See section III (c) 2. above.

alone, never to be replaced by any other rules or principles. The latter type of rule is obviously not in point here, and both Courts obviously reject it.<sup>135</sup>

There is, furthermore, another distinction which it is necessary to make. Given the existence of a primary delimitatory rule based upon the idea of geologically defined natural prolongation: geological natural prolongation may, nevertheless, still have legal significance beyond this primary rule, being used in yet another sense. Thus, in the *Tunisia-Libya* case, the Court, having found the primary rule not to be applicable in the circumstances of the case, proceeds:

The conclusion that the physical structure of the sea-bed of the Pelagian Block as the natural prolongation common to both Parties does not contain any element which interrupts the continuity of the continental shelf does not necessarily exclude the possibility that certain geomorphological configurations of the sea-bed *which do not* amount to such an interruption of the natural prolongation of one Party with regard to that of the other, may be taken into account for the delimitation, as relevant circumstances characterizing the area.<sup>136</sup>

That geology and geomorphology may continue to be relevant to the delimitatory process, even after the primary rule has failed to operate, is also recognized by Feldman,<sup>137</sup> and, albeit tentatively, by Professor Bowett.<sup>138</sup>

The nature of this continued significance would seem to be that geology ranks as a principle. It is true that the International Court, in the passage quoted above, explains this continued significance as in the nature of 'relevant circumstances characterizing the area' which 'may be taken into account for the delimitation'. However, it is submitted that 'relevant circumstances' are mere data, and that they just constitute the facts to which the 'equitable principles' apply, as Blecher writes.<sup>139</sup> It is the existence of principles which relate to these circumstances which makes them relevant<sup>140</sup> and which determines how to give effect to them. If this were not the case, then a decision based purely upon 'relevant circumstances' would be a purely discretionary one, not regulated or guided by law: in short, it would be a decision *ex aequo et bono*; and yet it is clear that the Court is not deciding the case on that basis.<sup>141</sup> Consistently with this analysis, the Court in the *Tunisia-Libya* case states that 'equitable principles', which are of 'primordial importance' in the delimitation of the

<sup>135</sup> Ibid.

<sup>136</sup> Para. 68; also *ibid.*, paras. 66 and 80, and the *dispositif* at para. 133 (A) (2) (3); cf. the *Anglo-French* case at para. 232.

<sup>137</sup> Loc. cit. above (p. 147 n. 101), at p. 226.

<sup>138</sup> Loc. cit. above (p. 152 n. 129), at p. 17.

<sup>139</sup> Loc. cit. above (p. 152 n. 131), at p. 64.

<sup>140</sup> Cf. the Scots use of the term 'relevancy' to denote the quality of facts as capable of sustaining a cause of action because of the existence of a rule of which they are the conditions of application; see Judge Evensen in the *Tunisia-Libya* case at p. 296.

<sup>141</sup> Ibid., para. 71.

continental shelf, 'dictate that "the relevant circumstances which characterize the area" be taken into account'.<sup>142</sup> (Indeed, it may be noted that the *dispositif* in the *Tunisia-Libya* case mentions 'proportionality' as a 'relevant circumstance' to be taken into account;<sup>143</sup> yet it is pre-eminently clear that 'proportionality' is a principle.)<sup>144</sup> If there is still any doubt on this question, it may be remembered that the International Court in the *North Sea* cases enumerates natural prolongation 'in a physical sense' as one of the 'aspects' which must be taken into account,<sup>145</sup> these 'aspects' constituting principles, as has already been shown.<sup>146</sup>

Whatever the exact nature of this principle, it is clear that it may coexist with the primary rule under discussion; for their conditions of application may be different: the latter looking for 'marked disruptions' sufficient to create two 'separate continental shelves', and, if it finds none, ceasing to apply; and the former applying to lesser geological and geomorphic features ignored by the primary rule, and operating even when the primary rule has failed to work. This is what the Court in the *Tunisia-Libya* case seems to contemplate in the passage cited above,<sup>147</sup> and in its discussion of the Tripolitanian Furrow.<sup>148</sup>

There are thus three different senses in which the term 'natural prolongation' is used as a delimitatory norm referring to the geological and geomorphological characteristics of the sea-bed: as a single and absolute delimitatory rule; as a primary delimitatory rule; and as a delimitatory principle.

There are, however, several problems connected with the existence of the primary rule. First, there seems to be no support for such a rule in the judgment of the Court in the *North Sea* cases. Where the terminology of natural prolongation is used in those cases, it has nothing to do with the sense now under discussion. In the one instance in which it is used in a geological sense, the term is expressly qualified by the words 'in a physical sense'.<sup>149</sup> Where geology is referred to, it is in a manner befitting a principle and not a rule.<sup>150</sup> There is no suggestion at all in the Court's discussion of the Norwegian Trough that the delimitation between Norway and the United Kingdom ought to have followed that feature, as the primary rule would surely suggest.<sup>151</sup>

Secondly, although the *Anglo-French* case may be read to suggest the existence of the primary rule, there are powerful statements in the award which are contradictory in import. The Court observes emphatically that State practice runs counter to giving any 'critical significance' to 'physical

<sup>142</sup> Para. 72.

<sup>144</sup> See section V (d) below.

<sup>146</sup> See section IV (a) above.

<sup>148</sup> Para. 80.

<sup>150</sup> See pp. 147-8 above, and text at n. 145 above.

<sup>151</sup> Feulner claims this passage at para. 45 supports the proposition that, but for the agreement of the parties, the Trough would have dictated the delimitation, according to the primary rule: loc. cit. above (p. 152 n. 132), at pp. 94-5; but it would seem correct, with Bowett, to characterize this passage as

<sup>143</sup> Para. 133 (B) (5).

<sup>145</sup> Paras. 94, 95, 101 (D) (2) and 45.

<sup>147</sup> Para. 68, quoted at p. 153 above.

<sup>149</sup> Para. 45; see p. 147 above.

feature[s]'.<sup>152</sup> Such features are placed where they are 'simply as a fact of nature',<sup>153</sup> implying that there is no norm to give them much, if any, significance. Moreover, the Court firmly contrasts physical and legal 'natural prolongation':

The physical continuity of the continental shelf of the English Channel means that geographically it may be said to be a natural prolongation of each one of the territories which abut upon it. The question for the Court to decide, *however*, is what areas of continental shelf are to be considered as *legally* the natural prolongation of the Channel Islands rather than of the mainland of France. In international law . . . the concept of the continental shelf is a juridical concept. . . .<sup>154</sup>

Professor Brown, referring to this passage of the Court of Arbitration's award, remarks that the Court seems to be paying no more than 'lip service' to natural prolongation, and that the idea behind the reasoning of the Court is that geological natural prolongation is not relevant to delimitation between States.<sup>155</sup> More cautiously, Professor Bowett believes that the Court has decreased the emphasis on geology, and observes that, as a result, 'the utility of the "natural prolongation" criterion for boundary purposes, and when used in a geological sense, is highly questionable'.<sup>156</sup> It may further be noted that the International Court in the *Tunisia-Libya* case, whilst examining the sea-bed there for 'such a marked disruption or discontinuance . . . as to constitute an indisputable indication of the limits of two separate continental shelves', notes that 'so substantial a feature as the Hurd Deep was not attributed such a significance' in the *Anglo-French* case.<sup>157</sup>

Thirdly, there are even elements in the *Tunisia-Libya* decision which cast some doubt on the existence of this primary rule. The Court repeatedly emphasizes the 'cardinal importance of the satisfaction of equitable principles in the delimitation process',<sup>158</sup> and that equitable principles 'are of primordial importance in the delimitation of the continental shelf'.<sup>159</sup> Also, the Court seems to contemplate that geology and geomorphology will only serve to provide the delimitatory line where 'appropriate' as suggested by the geographical circumstances.<sup>160</sup> This would seem to express the operation of geologically defined 'natural prolongation' as a principle alongside other more powerful and weightier principles, and not as a primary rule, which would show no regard for the parties' coastlines.

'delphic' and 'obscure': loc. cit. above (p. 152 n. 129), at pp. 16 and 17. It might be argued that the Court reserves the point, just observing that the parties chose to ignore the Trough; but there is no indication in favour of such a boundary, and, given the drastic consequences which might flow from the primary rule, surely the onus is on those who maintain its existence to prove it positively.

<sup>152</sup> Para. 105.

<sup>153</sup> Para. 108.

<sup>154</sup> Para. 191 (emphasis in original).

<sup>155</sup> Loc. cit. above (p. 147 n. 102), at pp. 480-1.

<sup>156</sup> Loc. cit. above (p. 152 n. 129), at pp. 15 and 16.

<sup>157</sup> Para. 66.

<sup>158</sup> Para. 44.

<sup>159</sup> Para. 72; see also para. 114.

<sup>160</sup> Paras. 43 and 44.

There is a more fundamental argument against the existence of the primary rule, based upon the judgment in the *Tunisia-Libya* case. The International Court there declares, as has already been noted above, that the legal concept of the continental shelf, 'while it derived from the natural phenomenon, pursued its own development';<sup>161</sup> there is, it says, a 'lack of identity' between the two ideas.<sup>161</sup> The whole thrust of this argument is towards the conclusion that no delimitation can be governed by the scientific phenomenon of the shelf and its physical attributes. The Court thus rejects the Libyan argument that there is a single, absolute delimitatory rule based on the identification of scientific natural prolongation. For, given the 'divorce' between the physical and the legal ideas, to follow the physical idea and its offshoots might well bring the resulting solution into conflict with the rationale of the legal idea, negating the policy goals behind the regime of the continental shelf. Geomorphic and geological features may be useful in some cases, but only where the line thereof complies with the delimitation suggested by the interaction of various non-geological and non-geomorphic principles of delimitation,<sup>162</sup> which are 'derived from the concept of the continental shelf itself, as understood in international law'.<sup>163</sup> To adopt subsequently a primary delimitatory rule based upon the geologically interpreted idea of natural prolongation would seem to fly in the face of this reasoning.

From this point of view, an examination of the Court's treatment of the Tripolitanian Furrow is instructive.<sup>164</sup> Considering this feature in the light of the geologically defined *principle* of natural prolongation, the Court finds that it runs 'comparatively near' and 'roughly parallel to' the Libyan coast. A boundary drawn along it would thus prejudice Libya's security interests in the region—part of the *raison d'être* of the continental-shelf regime.<sup>165</sup> The Court proceeds to say:

it is a feature of such a kind, and *so positioned* . . . that unless it were such as to disrupt the essential unity of the continental shelf so as to justify a delimitation on the basis of its identification as the division between areas of natural prolongation, it would be an element *inappropriate* for inclusion among the factors to be balanced up with a view to equitable delimitation.<sup>166</sup>

Yet, as this passage and the others referred to above indicate, the Court does seem to contemplate that, had the Furrow in fact constituted a major discontinuity in the continental shelf of the Pelagian Block so as to fall within the *primary rule*, then it would have determined the solution to the case regardless of its position near to and in front of the Libyan

<sup>161</sup> Para. 42: see pp. 136–8 above.

<sup>162</sup> Paras. 43 and 44.

<sup>163</sup> Para. 36.

<sup>164</sup> Para. 80.

<sup>165</sup> See Judge Jiménez de Aréchaga, paras. 69–75, and p. 144 above.

<sup>166</sup> Para. 80 (emphasis added); see section V (b) below.

coast.<sup>167</sup> It is hard to resist the conclusion that the Court is contradicting itself.

A comparison may be made with the judgment of Judge *ad hoc* Jiménez de Aréchaga. He starts from a premiss similar to the one adopted by the Court: that 'the right of the coastal State to explore and exploit the submarine areas adjacent to its coast does not depend on the existence of a continental shelf in the geological or the geomorphological sense'.<sup>168</sup> However, he arrives at the firm conclusion that 'since geomorphology and geology were not admitted as the tests for the existence and recognition of the right to explore and exploit adjacent submarine areas, they cannot constitute by themselves valid grounds or applicable criteria for continental shelf delimitation'.<sup>169</sup> For, as he points out, there is a contradiction in recognizing shelf rights despite interruptions in the physical shelf or even the lack of a physical shelf, and then setting a limit to the rights of a certain State because of such phenomena as troughs, sea-bed contours, and so on.<sup>170</sup> It is inconsistent to recognize that a State has legitimate interests in possessing jurisdiction over certain areas off its coasts and then to deny the full scope of those interests. This inconsistency has been recognized in State practice, he argues, citing in particular the example of the Norwegian Trough.<sup>171</sup> Moreover, as has already been noted above, Judge *ad hoc* Jiménez de Aréchaga stresses that, if a delimitation is governed by geological or geomorphological factors, it might produce results in flagrant conflict with the very *raison d'être* of the continental-shelf regime.<sup>172</sup> The judge concludes:

there was . . . an immediate and almost instinctive rejection by all coastal States of the possibility that foreign States, or foreign companies or individuals, might appear in front of their coasts, outside their territorial sea but at a short distance from their ports and coastal defences, in order to exploit the sea-bed and erect fixed installations for that purpose.

Thus, the fact that a trough or ridge may appear close to the shoreline of a State, or that the strata of rock may be similar to that of certain sediments in another land territory, cannot be valid grounds for attributing a certain area of shelf to a certain State to the detriment of another 'in front of whose coastline it lies'.<sup>173</sup>

This very argument is made by several commentators on the *Tunisia-Libya* case. Quéneudec writes that 'la nouvelle conception du plateau continental', whereby there may be sovereign rights over the sea-bed up to

<sup>167</sup> The Court in fact found the part of the Furrow within the area relevant to the delimitation—see para. 75—was not such a major discontinuity. The Court notes that the Furrow 'does not display any really marked relief until it has run considerably further to the east than the area relevant to the delimitation': paras. 66 and 80. Yet there is no indication that, had it felt itself able to consider these areas, the Court would have treated the Furrow as sufficiently substantial to constitute such a major discontinuity as to spring the primary rule.

<sup>168</sup> Para. 42; see also paras. 39, 40, 51, 54 and 56.

<sup>169</sup> Para. 49; see also paras. 61 and 62.

<sup>170</sup> Para. 49.

<sup>172</sup> See p. 144 above.

<sup>171</sup> Para. 44.

<sup>173</sup> Paras. 72-3.

200 nautical miles from the baselines of the territorial sea although there is no continental margin at these distances, 'tend à estomper le lien qu'on pourrait établir entre le plateau et les données géologiques et géomorphologiques. Dans ces conditions, il était difficile pour la Cour de voir, dans les considérations géologiques et géomorphologiques un élément essentiel pour la délimitation.'<sup>174</sup> Similarly, Zoller observes with much force that, in so far as the *Tunisia-Libya* case affirms that the continental shelf is now a purely legal idea and is not tied to the existence of any physical phenomenon, this cannot be without influence upon the law of delimitation, breaking the influence of geological factors, and rendering methods of delimitation based upon them inoperative.<sup>175</sup> She states that geological natural prolongation is thus reduced to the subsidiary role of a simple circumstance relevant to the delimitation problem.<sup>176</sup> Yet both of these authors take note of the passages cited above in support of the primary rule, and both remark that the *Tunisia-Libya* case has not excluded the possibility that, in other circumstances, geology might impose itself in a clear and incontestable way and dictate how to delimit the boundary.<sup>177</sup> Decaux likewise acknowledges these passages, and that, on the facts, the Court found no such fundamental discontinuity as to spring the primary rule. However, he believes that, in the *Tunisia-Libya* case, 'le prolongement naturel . . . se présente de manière exemplaire', citing Tunisia's characterization of the Tripolitanian Furrow as a '*thalweg*'.<sup>178</sup> Thus he concludes that 'la Cour semble cependant avoir étayé avec des arguments de fait une position de principe', rejecting the relevance of geological natural prolongation.<sup>179</sup> This line of reasoning, Decaux seems to think, springs from the Court's affirmation that the legal shelf and the physical shelf are distinct.<sup>180</sup>

This argument has considerable force if the legal shelf is indeed quite detached from the physical phenomenon. But what if the legal shelf is in fact tied to the concept of the physical prolongation of the mainland territory of a State? This is not a purely academic point; for the legal shelf was believed by many writers to be attached to the physical phenomenon before the *Tunisia-Libya* case, and it is even arguable that this is still the

<sup>174</sup> Loc. cit. above (p. 149 n. 110), at p. 207.

<sup>175</sup> Loc. cit. above (p. 138 n. 36), at pp. 654-5 and 674.

<sup>176</sup> Ibid., p. 656. For Zoller, this is a radical change: according to her, the existence of a physical shelf was made the basis of the legal shelf in the *North Sea* cases, and accordingly delimitation was based on physical criteria (ibid., pp. 650 and 654-5). It is the shift in the legal basis of the shelf caused by the 200-mile criterion in the United Nations Convention that has brought about this change. In contrast, although Quéneudec also focuses on the new 200-mile criterion, he does not believe the downplaying of geology in *Tunisia-Libya* is 'une démarche fondamentalement nouvelle', since, even if the legal shelf was tied to a physical phenomenon in the *North Sea* cases, the Court there made it clear that the appurtenance of an area considered as an entity does not govern its delimitation: loc. cit. above (p. 149 n. 110), p. 206.

<sup>177</sup> Zoller, loc. cit. above (p. 138 n. 36), pp. 672-3; Quéneudec, loc. cit. above (p. 149 n. 110), p. 206.

<sup>178</sup> Loc. cit. above (p. 137 n. 33), at p. 367.

<sup>179</sup> Ibid., p. 368.

<sup>180</sup> Ibid., pp. 368-70.

case in customary international law and under the Geneva Convention on the Continental Shelf, despite the statements of the International Court to the contrary. Moreover, under the United Nations Convention on the Law of the Sea, a coastal State has sovereign rights to the sea-bed beyond 200 nautical miles from the baselines of its territorial sea if the continental margin which prolongs its mainland territory extends beyond that line.<sup>181</sup> With regard to features which are not of such a nature as to terminate the legal shelf, the argument developed above still points against giving them critical significance. With regard to features which *are* of this nature, there is a stronger argument in favour of using them to determine the boundaries of the continental shelf, as suggested by the primary rule. For then there are two separate legal continental shelves, divided by an area which is not legally subject to shelf rights; and, in such a case, it is difficult to think of the sea-bed beyond such a feature as 'adjacent' to a given coastal State, or as part of its 'natural prolongation'. However, this is to think of 'adjacency' and 'natural prolongation', when used as the basis of coastal State title, in an exclusively geological sense. If these terms are used in a legal sense and in abstraction from geology, referring to the policy reasons behind continental-shelf jurisdiction and the area over which they suggest that a coastal State has legitimate interests which merit protection, then there is no reason why the 'natural prolongation' of one State should not extend to the physical prolongation of another State.<sup>182</sup>

In addition to these arguments which cast some doubt on the alleged primary rule, it may be noted that, in each of the cases so far decided, there has been one physical shelf. The tribunals have, therefore, never been faced with the necessity of actually applying the primary rule. Moreover, as the Court of Arbitration notes in the *Anglo-French* case, State practice does not seem to reflect the existence of such a rule.<sup>183</sup>

In the light of these arguments, it is an open question whether the primary rule does in fact exist.

## V. WHAT ARE THE EQUITABLE PRINCIPLES?

### (a) *Reflecting the Configuration of the Coast*

What is pre-eminently clear is that the tribunals have placed central emphasis upon 'reflecting'<sup>184</sup> the 'configuration' of the coastlines of the delimiting States. In the *North Sea* cases, the International Court states that the configuration of the coastlines of the delimiting States is a

<sup>181</sup> United Nations Convention on the Law of the Sea, Article 76.

<sup>182</sup> But it is doubtful that this argument can be made under the UN Convention as to the continental margin where it extends beyond 200 miles; for Article 76 (1) not only provides that the continental margin beyond 200 miles is legally continental shelf, but also appears to prescribe that those areas pertain to the State whose territory they *physically* prolong.

<sup>183</sup> Para. 107; see also Judge Jiménez de Aréchaga in *Tunisia-Libya* at paras. 38 and 64. But cf. Collins and Rogoff, who find conflicting evidence: *Maine Law Review*, 34 (1982), p. 1, at pp. 19-20 and n. 65.

<sup>184</sup> *Anglo-French* case, para. 100.

circumstance which must be examined closely and given effect, since 'the land dominates the sea' and is 'the legal source of the power which a State may exercise over territorial extensions to seaward'.<sup>185</sup> In the *Anglo-French* case, the Court of Arbitration affirms that 'the appropriateness—the equitable character—of the method [of delimitation] is always a function of the particular geographical situation'.<sup>186</sup> Therefore, 'a State's continental shelf, being the natural prolongation of its territory, must in large measure reflect the configuration of its coasts'.<sup>187</sup> Moreover, the International Court stressed the centrality of coastal configuration in the *Tunisia-Libya* case. For it is the change in the direction of the Tunisian coast in the Gulf of Gabes which dictates the division of the delimitation into two sectors there.<sup>188</sup> It also dictates the solution to that case: the line in the first sector reflects the 'direction of the coast-line' around Ras Ajdir;<sup>189</sup> and the line in the second sector is drawn so as to attribute 'sufficient weight' to the 'general change in the direction of the Tunisian coast' and the 'existence and the position of the Kerkennah Islands'.<sup>190</sup>

The reasons for this constant emphasis in the jurisprudence on the configurations of the parties' coastlines are clear. First, the whole system which has been devised for the orderly and rational exploitation of the coastal seabed is based upon coastal State jurisdiction. A coastline must, therefore, have some significance in the delimitatory process (if only as a factor qualifying the coastal State to exercise sovereign rights). Secondly, it is clear that the rationale of the system of coastal State jurisdiction would be negated if there were not such a principle of delimitation. For instance, a delimitation conferring jurisdiction on State A over areas of sea-bed lying much closer to the coast of State B might well give State A control in areas where State B has a much greater security interest in regulating activities off its coast. It might also not be conducive to rational exploitation of the area in question, since State B's actual or potential coastal facilities to support exploitation are nearer; and it might even give State A control over the submarine extension of land-based deposits under the sovereignty of State B. Moreover, the expectations of coastal States as to how much seabed they will receive are dependent upon their coastlines, and these expectations must not be disappointed lest the international delimitatory regime be made unworkable.

Accordingly, in the *Tunisia-Libya* case, the International Court states that 'the geographic correlation between coast and submerged areas off the coast is the basis of the coastal State's title'.<sup>191</sup> The Court is discussing the basis of coastal State entitlement here, and not delimitation, as the Court

<sup>185</sup> Para. 96.

<sup>186</sup> Para. 84; see also para. 87.

<sup>187</sup> Ibid., para. 100; see also para. 246.

<sup>188</sup> Para. 114; see also the discussion of equidistance at para. 126.

<sup>189</sup> Para. 120 (last sentence).

<sup>190</sup> Para. 127.

<sup>191</sup> Para. 73; also para. 41: 'a particular relationship'.

itself makes clear.<sup>192</sup> Nevertheless, the Court proceeds from this statement to an exposition of the parts of the coastlines of the litigating States which are relevant to the delimitation;<sup>193</sup> and thence to listing the configuration of the coastlines of the parties as the first circumstance to be taken into account in delimitation.<sup>194</sup> Furthermore, it is here that the Court notes that this circumstance may well divide the delimitation into two sectors. This evidence tends to support the proposition that coastal configuration is central in delimitation, and this for reasons related to the very rationale of the continental-shelf regime.

### 1. *The application of the principle of coastal geography*

To say that a delimitation must reflect the configuration of the coastlines of the delimiting States does not take us very far. There are clearly very many ways in which it is feasible to relate a delimitatory line to coastal features. It is, therefore, necessary to see briefly how the tribunals have interpreted this fundamental principle.

(i) *Perpendicularity: natural prolongation and non-encroachment.* The first method which has been devised to give effect to this principle seems to be that of 'perpendicularity to the coast'. The International Court makes this 'factor' explicit in the *Tunisia-Libya* case.<sup>195</sup> If it is necessary to project the configuration of each delimiting State seawards, then, geometrically, it is possible to do so in many ways: for instance, in parallelogram-fashion in relation to a base formed by the coast. It has been decided to project the coastline in a perpendicular fashion. This is clearly to be seen in paragraph 44 of the *North Sea* cases, where the Court rejects the inherence of equidistance:

the use of the equidistance method would frequently cause areas which are the natural prolongation or extension of the territory of one State to be attributed to another, where the configuration of the latter's coast makes the equidistance line swing out laterally *across the former's coastal front, cutting it off* from areas situated *directly before that front*.<sup>196</sup>

The Court also adverts to these dangers in the application of equidistance in the *Tunisia-Libya* case, and considers that the solution which it adopts in that case—a perpendicular line, basically—avoids the dangers of such 'cut-off' effects.<sup>197</sup>

In his judgment in the *Tunisia-Libya* case, Judge *ad hoc* Jiménez de Aréchaga refers to this and the preceding paragraph from the *North Sea* cases and proceeds to explain them in such a way as to suggest another possible sense of the term 'natural prolongation'.

<sup>192</sup> 'Adjacency of the sea-bed to the territory of the coastal State has been the paramount criterion for determining the legal status of the submerged areas, as distinct from their delimitation': para. 73.

<sup>193</sup> Paras. 74-5.

<sup>194</sup> Paras. 76 and 78.

<sup>195</sup> Para. 120; noted by Feldman, *loc. cit.* above (p. 147 n. 101), at p. 231.

<sup>196</sup> Emphasis added.

<sup>197</sup> Para. 76.

In paragraph 43, in a passage already quoted above,<sup>198</sup> the International Court says that 'natural prolongation' is the basis of coastal State rights over adjacent sea-bed areas: certain reasons justify coastal State title to a certain area off its coast, which may be termed the natural prolongation of that State. The Court realizes that the 'natural prolongations' of two States may well overlap, because the reasons justifying coastal jurisdiction suggest that they both have legitimate interests which merit protection in a certain area of sea-bed. Then, the Court says,<sup>199</sup> the process of delimitation must be directed towards ascertaining the 'most natural' prolongations of each State, and not allocating to one State areas more naturally appurtenant to the other delimiting State: that is, the law which governs delimitation should ensure that each State receives those areas of sea-bed where its interests which are protected by the continental-shelf regime are strongest when compared with the interests of the other delimiting State in the area in question. The connection between the reasons justifying title and the rules and principles delimiting jurisdiction is therefore most emphatically made.<sup>200</sup>

The idea of seeking to achieve the 'most natural prolongation' of each delimiting State is expressed later on in the Court's judgment in terms of minimizing the 'encroachment' of one State's natural prolongation on that of the other delimiting State.<sup>201</sup> Thus stated, however, the concept of 'non-encroachment' is purely formal. It suggests the operation of a delimitatory principle which is weighted to ensure the protection of the reasons which justify coastal State title over the shelf. What it means in application is therefore, at least to some degree, dependent on what these reasons are.

Judge *ad hoc* Jiménez de Aréchaga believes that the *raison d'être* of coastal State jurisdiction and sovereign rights over the shelf is security—that foreign activities off the coastal front of a State and directly in front of its ports and coastal defences should not go unsupervised and unregulated by that State.<sup>202</sup> Therefore the natural prolongation of a State—the area over which the reasons behind the regime of the shelf suggest that it should *prima facie* receive jurisdiction—is the perpendicular projection seawards of its coastal front.<sup>203</sup> Consequently, he says that the 'non-encroachment principle'—the principle governing delimitation—aims to ensure that each delimiting State receive jurisdiction over the sea-bed areas directly in front of its coastline, and that the perpendicular projection of each State encroach as little as possible on the perpendicular projection of the other: the shelf of one State should seek to avoid 'cutting-off' the other from areas 'directly before', or 'in front of', its coastline.<sup>204</sup> Each State should receive

<sup>198</sup> See p. 136 above and text at n. 22.

<sup>199</sup> Para. 43, also quoted above at p. 145 (text at n. 89) and below at p. 185.

<sup>200</sup> See also below at p. 185.

<sup>202</sup> Paras. 70–3.

<sup>204</sup> Paras. 58, 59, 69 and 73.

<sup>201</sup> Paras. 85 (C) and 101 (C) (1).

<sup>203</sup> Para. 58.

those areas where its security interests are the stronger. The 'non-encroachment principle', as the judge calls it, therefore seems to be synonymous with the principle of reflecting the configuration of the coastline when it is interpreted in terms of perpendicularity.

Judge *ad hoc* Jiménez de Aréchaga believes that this is the line of reasoning underlying the judgment of the Court in the *North Sea* cases in the passages referred to. For the Court, having stated that the delimitation process should be directed towards finding the 'most natural prolongation' of each State, then discusses equidistance in the passage quoted at the beginning of this section; and, as has been seen, rejects equidistance as a delimitatory rule since it often causes a boundary to cut across in front of the perpendicular projection seawards of a State's coastline. The way to find the 'most natural prolongation' of a State—the delimitatory result—is therefore through applying perpendicularity, which is a principle because it protects certain reasons behind the continental-shelf regime.

This seems to point to a central connection between the concept of 'natural prolongation' and perpendicularity in the judge's reasoning: a State's natural prolongation—the area over which the reasons behind the shelf regime suggest it has title—is its perpendicular projection seawards; its 'most natural prolongation'—the delimitatory result—is its maximum possible perpendicular projection compatible with that of the other delimiting State; and the principle which enables the delimitator to reach this result is perpendicularity, which the judge talks of as the 'non-encroachment principle'. According to Judge *ad hoc* Jiménez de Aréchaga, therefore, natural prolongation and perpendicularity are much the same thing. Indeed, he speaks of natural prolongation and non-encroachment as 'two sides of the same coin',<sup>205</sup> and 'fundamental and complementary'.<sup>206</sup>

Feldman cites this line of reasoning with approval. Like the judge, he too believes that the Court in the *North Sea* cases was preoccupied with the idea of the continuation or perpendicular extension of each State's coastal front and the necessity to avoid 'cutting-off' this extension, and he finds this same concern in the judgment of the Court in the *Tunisia-Libya* case, especially in its espousal of a perpendicular line.<sup>207</sup> However, whilst the judge speaks of perpendicularity and natural prolongation as substantially identical, Feldman conceives of perpendicularity as but one 'dimension' of natural prolongation, an 'aspect' of it, an 'equitable principle' alongside other equitable principles.<sup>208</sup>

Even if one does not go as far as Judge *ad hoc* Jiménez de Aréchaga and it is conceded that other principles besides perpendicularity might influence the delimitation, nevertheless his judgment points out at least some of the reasons which make perpendicularity a delimitatory principle. Moreover,

<sup>205</sup> Para. 59.

<sup>206</sup> Para. 66.

<sup>207</sup> Loc. cit. above (p. 147 n. 101), at pp. 227-8, 231 and 238.

<sup>208</sup> Ibid., pp. 227 and 231-2.

as a method of delimitation, it has virtues of simplicity and reasonable certainty. Because of this, it long constituted one of the options under consideration by the International Law Commission as a method for the delimitation of the territorial sea.<sup>209</sup>

(ii) '*Closest proximity*' and *equidistance*. The second way of reflecting the principle of coastal geography is that of 'closest proximity', which may receive expression through the delimitatory method of equidistance (but not exclusively). It has repeatedly been stated that, as a part of the law of delimitation, this concept is not absolute, dictating delimitatory solutions;<sup>210</sup> but this merely states the fact that, as part of that law, it does not constitute a rule, but a principle. In the conflict of principles, other principles may, in the circumstances of the case, prevail in the drawing of the boundary line; but, on the other hand, the circumstances may be such that the principle of 'closest proximity' prevails so as to suggest its plotting according to the method of equidistance. This behaviour is exactly what the International Court contemplates in the *North Sea* cases:

The question of which parts of the continental shelf 'adjacent to' a coastline bordering more than one State fall within the appurtenance of which of them, remains to this extent an open one, not to be determined on a basis exclusively of proximity. Even if proximity may afford one of the tests to be applied and an important one in the right conditions, it may not necessarily be the only, nor in all circumstances, the most appropriate one.<sup>211</sup>

Similar formulations may be found in the *Anglo-French* case<sup>212</sup> and the *Tunisia-Libya* case.<sup>213</sup>

The reasons behind the concept of 'closest proximity' which give it legal force as a delimitatory principle are several. First, one of the goals behind the regime of the continental shelf is that the rational and prudent exploitation of the sea-bed of the coastal sea requires coastal State jurisdiction over all such activities off its coasts; and this suggests that a given area of sea-bed should be under the control of that State whose coast is nearest, and therefore able to provide the closest and most convenient mainland facilities to support exploitation activities. This point is made by Judge Jessup in the *North Sea* cases,<sup>214</sup> and by Judge *ad hoc* Jiménez de Aréchaga in the *Tunisia-Libya* case.<sup>215</sup> Secondly, the delimitatory method of equidistance, which gives practical effect to 'closest proximity', possesses the virtue of certainty and simplicity, as the International Court notes in the *North Sea* cases.<sup>216</sup> It may also be felt that the principle of

<sup>209</sup> See *Tunisia-Libya* case, para. 119.

<sup>210</sup> See, e.g., *North Sea* cases, para. 83.

<sup>211</sup> Para. 42, quoted in the *Anglo-French* case, paras. 80-1; see also *Tunisia-Libya* case, para. 110.

<sup>212</sup> Para. 81.

<sup>213</sup> Para. 126.

<sup>214</sup> pp. 67-8, quoting the Federal Republic of Germany's memorial.

<sup>215</sup> Paras. 75 and 104.

<sup>216</sup> Para. 22.

'closest proximity' gives practical effect to the protection of coastal State security interests, and also meets the expectations of States that they receive comparable amounts of sea-bed, mile for mile of their coastlines; but, as has already been observed,<sup>217</sup> this is not necessarily the case, and equidistance solutions may be inconsistent with these aims.

This raises a problem. For, if 'closest proximity' only gives positive effect to the goal of rational exploitation, then it is not a very weighty principle of delimitation, even if it had important advantages in being simple and certain, since rational exploitation is arguably one of the lesser goals which constitute the rationale of the shelf regime. Yet this hardly reflects the important role which the method of equidistance seems to possess in delimitatory law. It is, indeed, the presumptively correct solution in the case of opposite States.<sup>218</sup> Nevertheless, it is submitted that the explanation above is correct. The reason for the particular hold of equidistance is that, in the case of opposite States, and in the case of adjacent States on an even coastline, the resulting solution effects, not only the goal of rational exploitation, but also security and the expectations of a comparable share of the sea-bed. This is because a line drawn according to the equidistance method between two opposite coasts will generally divide, at an equal distance from the respective coastlines of the two delimiting States, the perpendicular projections seaward thereof, and will also divide the area of sea-bed involved equally between those two States.<sup>219</sup>

(iii) *Objections.* Several objections may be made to this rationalization of the goals which appear to lie behind the principles and methods of delimitation outlined above. First, it might be said that these policies behind the continental-shelf regime, though they might be conceded as relevant to sea-bed areas close to the coast, have a very tenuous relevance to areas further seaward. At such distances, it is difficult to say that one State is more threatened than another by unsupervised foreign installations or research, or, given modern leaps in marine technology, that an area is more rationally exploited by one State or another. Therefore the application of the principles and methods discussed to areas further seaward cannot be explained by reference to the policy considerations referred to.

However, as has been shown, the application of these principles and methods to coastal areas is explicable, at least partly, in terms of the policy goals behind the continental-shelf regime. Moreover, the jurisprudence has recognized the importance of considerations of simplicity and convenience in the delimitation of the continental shelf.<sup>220</sup> Consequently,

<sup>217</sup> p. 142 above, and p. 161 above.

<sup>218</sup> See p. 143 above. Professor Bowett notes that the Court in the *Anglo-French* case places considerable emphasis upon equidistance: loc. cit. above (p. 152 n. 129), at pp. 13-14.

<sup>219</sup> See esp. *North Sea* cases, para. 57.

<sup>220</sup> *North Sea* cases, para. 22; also *Anglo-French* case, para. 85.

if the law discussed above is to be used to delimit areas closer to the coast, then there are good reasons of simplicity and convenience for applying the same law to more distant areas of sea-bed.

A second possible objection is that the emphasis placed here upon the reflection of coastal configuration seems to be controverted by paragraph 91 of the judgment of the International Court in the *North Sea* cases. There the Court develops the concept of a ratio between the amount of sea-bed received by a State and the length of its coastline—the principle of proportionality<sup>221</sup>—and then contemplates this principle's prevailing over the solution suggested by coastal configuration. Yet, given the status of proportionality as a principle (as its listing together with coastal configuration in section (D) of the *dispositif* suggests), the solution envisaged in paragraph 91 does not disprove the importance placed above on coastal configuration, perpendicularity, 'closest proximity' and equidistance. If there is a conflict of principles, one principle may be weightier than the other and so overcome the solution suggested by the latter on its own. However, the latter principle is not deprived of effect: as the former principle comes closer to achieving its purpose and its urgency decreases accordingly, so the latter principle may then, in relation to the areas in question, become comparatively weightier, and thus mould the resulting solution. The latter principle—coastal configuration—thus serves to determine the way in which the former—proportionality—is applied to the facts. The State's 'proper share' is not delimited in any form and anywhere. Where it receives it, and in what 'shape' in relation to the coast, is governed by the principle of coastal configuration, which thus remains central. Indeed, this seems to correspond with what the International Court envisages in the *North Sea* cases. For paragraph 98, when combined with paragraph 96, and section (D) (3) of the *dispositif*, when read with section (D) (1), both seem to conceive a solution governed by the coastal configuration of the parties whilst achieving a solution corresponding with the principle of proportionality. Indeed, in paragraph 91 itself, proportionality is said to *adjust* the solution suggested by equidistance.

A third objection which may be made to this account is that there is no crucial difference between closest proximity and perpendicularity. For when the coasts of two States are each projected in a perpendicular fashion, then the principles of perpendicularity applied to the two coasts will be of identical weight where the distance from the coasts of the two States is the same: that is, along an equidistance line. This definitely occurs in the case of opposite States; and it often occurs where two States are adjacent to each other. However, it is by no means always the case, and the two principles may produce very different results. Thus, in the case of a State with a concave coastline, equidistance lines delimiting the boundaries with both its neighbours will cut across in front of the coast of

<sup>221</sup> See section V (b) below for a discussion of proportionality.

that State, leaving it with a small wedge of continental shelf—a result which the International Court rejected in the *North Sea* cases.<sup>222</sup> A peninsular State, or a State with a convex coastline, can produce a similar problem for its neighbours. These ‘cut-off’ effects are unacceptable partly because they cause an encroachment upon the perpendicular projection of the neighbouring States’ coastlines and thus prejudice their security interests in the sea-bed in front of their coasts.<sup>223</sup> It is also to be noted that small coastal projections, islets, and so on can produce similar effects when the equidistance method is used. In contrast, perpendicularity does not produce such effects, because it operates in relation to a line<sup>a</sup> formed by the general direction of the coast, ignoring such phenomena.<sup>224</sup>

## 2. *Examples*

The delimitatory lines suggested or drawn by tribunals mirror the stress placed on the concept of coastal configuration. In the *Anglo-French* case, the Court of Arbitration draws a line reflecting ‘closest proximity’ in the Channel region to the east and to the west of the Channel Islands.<sup>225</sup> The Court uses equidistance once more in the Atlantic region, since, as the Court says, the resulting delimitation reflects the relationship of the coastlines of the United Kingdom and France to the areas of sea-bed in question.<sup>226</sup> This solution also complies with perpendicularity. For the coasts of the two States are said to be in broadly the same ‘relation’ to that area of sea-bed,<sup>227</sup> which lies ‘off’ these coasts.<sup>228</sup> The two coasts are, therefore, if joined by a straight line, as one baseline, on which the perpendicular is then drawn from a point midway between the two coasts.<sup>229</sup>

In the *Tunisia-Libya* case, in the first sector, a line drawn perpendicular to the general direction of the coast at Ras Ajdir is suggested to reflect the coastal configurations of the two parties. The Court thus adverts to coastal direction in paragraph 120. The fact that the line chosen for the first sector must change further out to sea is a function of the change in the direction of the Tunisian coast in the Gulf of Gabes and its resulting north-easterly course.<sup>230</sup> Moreover, the line chosen in the second sector is one running parallel to the coast of Tunisia<sup>231</sup>—a reflection of this coast by way of perpendicularity.<sup>232</sup> The Court says that increased weight was given to

<sup>222</sup> Paras. 8, 44 and 89 (a).

<sup>223</sup> And partly because such delimitations infringe proportionality: para. 91, *ibid.*

<sup>224</sup> Cf. *North Sea* cases, para. 89 (a).

<sup>225</sup> Para. 103: these are the equidistance points A-D and E-J (paras. 117-18).

<sup>226</sup> Para. 246.

<sup>227</sup> Para. 244; also para. 232.

<sup>228</sup> Para. 233, noting the ‘lateral’ relationship of the coasts.

<sup>229</sup> This is the equidistance point M.

<sup>230</sup> Paras. 114, 115 and 122.

<sup>231</sup> Paras. 127 and 128, hypothesizing the non-existence of the Kerkennah Islands.

<sup>232</sup> See esp. Judge Jiménez de Aréchaga in the *Tunisia-Libya* case, para. 115.

'closest proximity' in this second sector,<sup>233</sup> and this seems to be considered as reinforcing the parallel line solution.

### 3. *The varying weight of the principle of coastal configuration*

(i) *The 'distance factor'*. Given a delimitatory principle, and given its application to a certain coastline, the weight of the principle in favour of a certain solution does not remain fixed irrespective of the distance from the coastline in question of the area to which the principle is being applied. Thus the principle of perpendicularity, when it was applied to the Libyan coast, was of great weight with regard to the sea-bed areas closer to the coast because of the urgency in those areas of the security considerations behind the principle. It thus outweighed 'closest proximity' in the first sector.<sup>234</sup> However, with regard to areas further seawards, its urgency wore off. It thus permitted perpendicularity applied to the Tunisian headland and 'closest proximity' to come more into play as their comparative weight increased on account of the growing strength of Tunisian security interests and considerations of rational exploitation. This is the 'corrective factor of distance from the coast' in Judge *ad hoc* Jiménez de Aréchaga's 'non-encroachment principle'.<sup>235</sup>

(ii) *Disproportionality and 'modified' natural prolongation*. It seems that the weight of a principle of coastal configuration may vary in another way too. For, given a principle, and given its application to a certain area at a fixed distance from the coast, the weight of the principle may vary according to the qualities of the coastline which it is operating to reflect. Thus the tribunals speak of applying a principle with the same effect in relation to a regular mainland coastline and in relation to a 'minor coastal projection' or 'islet' as the creation of 'exaggeration',<sup>236</sup> 'distortion'<sup>237</sup> and '*effet exagéré de déviation*'.<sup>238</sup> This idea is also expressed in terms of 'disproportion'<sup>239</sup> and 'disproportionately distorting effect'<sup>240</sup> in the *Anglo-French* and *North Sea* cases; and the exercise of giving such an 'irregularity'<sup>240</sup> its appropriate expression as 'proportionality'.<sup>239</sup>

This usage of the term must be clearly distinguished from the idea of 'proportionality' already adverted to—the receipt of a certain unit-area of

<sup>233</sup> Para. 126.

<sup>234</sup> Clearly closest proximity and equidistance are considered in relation to the first sector, *pace* paras. 76 and 110, since equidistance is said to have more effect in the second sector, indicating that it was considered and received less effect in the first.

<sup>235</sup> See his separate opinion in the *Tunisia-Libya* case, para. 69.

<sup>236</sup> *North Sea* cases, para. 89.

<sup>237</sup> *Anglo-French* case, para. 100.

<sup>238</sup> *North Sea* cases, para. 57.

<sup>239</sup> *Anglo-French* case, para. 101.

<sup>240</sup> *North Sea* cases, para. 57.

sea-bed for each unit-length of coastline.<sup>241</sup> The Court of Arbitration in the *Anglo-French* case distinguishes the two usages sharply:

[the term] may appear in the form of the ratio between the areas of continental shelf to the lengths of the respective coastlines, as in the '*North Sea Continental Shelf*' cases. But it may also appear, and more usually does, as a factor for determining the reasonable or the unreasonable—the equitable or inequitable—effects of particular geographical features or configurations upon the course of an equidistance-line boundary.<sup>242</sup>

The terminology of ratio of sea-bed to coastline is not used in the latter concept; but is restricted to the former. The two concepts therefore seem to be serving different aims. This is subsequently confirmed by the Court at paragraph 250 of its judgment. For there it states that the concept of 'disproportionality' involves no 'nice calculations of proportionality in regard to the total areas of continental shelf accruing to the Parties'; and in applying it the Court undertakes no calculations of any such sort. Moreover, the Court makes it clear that 'disproportionality' has nothing to do with 'specific principles or rules of delimitation':<sup>243</sup> it is rather 'a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation'.<sup>244</sup> In contrast, it is clear that 'proportionality' is a principle, and so behaves very differently.

These distinct meanings are pointed to in the *North Sea* cases themselves. Where 'disproportional distortion' is referred to,<sup>245</sup> the idea of a ratio between land and sea is not used; and, in contrast to where the idea of a ratio is used, the French text uses the terminology of '*effet exagéré de déviation*' instead of '*rapport*'.<sup>246</sup>

To distinguish the two concepts, the terms 'proportionality' and 'disproportionality' will be used.<sup>247</sup>

That the weight of a principle may vary according to the coast to which it is applied seems to be the explanation of the discussion of 'absolute' and 'modified' natural prolongation in paragraphs 191 to 195 of the *Anglo-French* case. In this section of its judgment, the Court of Arbitration is faced with the problem of how to delimit the boundary in the Channel Islands area. By ignoring the existence of the Channel Islands, it envisages a solution based upon a median line, which it finds satisfactory.<sup>248</sup> This solution, however, will be totally upset if the Islands are then added and are treated in the same way as the English mainland for the purposes of the delimitation.<sup>249</sup> The Court then observes that the 'cardinal principle of "natural prolongation of territory" is not absolute, but may be subject to qualification in particular situations'. Other elements may be looked at; for 'in these cases the effect to be given to the principle of natural prolongation

<sup>241</sup> p. 166 above; and see section V (d) below.

<sup>243</sup> Ibid., para. 98.

<sup>245</sup> Para. 57.

<sup>247</sup> See section V (d) 3. below for more discussion of 'disproportionality'.

<sup>248</sup> Para. 182.

<sup>242</sup> Para. 100.

<sup>244</sup> Ibid., para. 99.

<sup>246</sup> Paras. 91, 98 and 101 (D) (3).

<sup>249</sup> Para. 183.

of the coastal State's land territory is always dependent not only on the particular geographical and other circumstances but also any relevant considerations of law and equity'.<sup>250</sup> So the case is 'therefore not resolved merely by referring to the principle of natural prolongation'.<sup>251</sup> Rather, 'the question is whether the Channel Islands should be given the full benefit of the application of the principle of natural prolongation . . . or whether their situation close to the mainland of France requires, on equitable grounds, some modification of the application of the principle in those areas'.<sup>252</sup>

Clearly, 'natural prolongation' is not being used here in any geological sense; for the Court rejects the usefulness of geology in paragraph 193. Rather, natural prolongation simply states the result of the application of the principles of coastal configuration. The structure of the judgment supports this contention. The Court notes the problem of treating the Islands on a par with mainland in paragraph 190; it then talks of 'modified' solutions in the passages quoted above; and proceeds to examine various factors relating to the Islands which give the principles of delimitation lesser, 'modified' weight. These factors are then found to be insufficient to justify treating the Islands in the same way as mainland coasts and giving them 'full effect'; but they are said to be of such a nature as to invalidate the 'modified' solution of a six-mile enclave, suggested by France.<sup>253</sup> A twelve-mile enclave is finally adopted.

Considerations of space preclude extensive consideration of what these factors are; but they may be briefly listed:

1. If an island is independent, or semi-independent, it will be treated as a mainland coastline; if it is not, it will receive less weight.<sup>254</sup>
2. If not independent,
  - (a) according to the *Anglo-French* case, relevant factors are its *momentary* status as to:
    - (i) demography,
    - (ii) economic life,
    - (iii) political organization.<sup>255</sup>

(But will developing States find this acceptable? And what if the island's status as to these factors subsequently changes, or is changed for the sake of the case?)<sup>256</sup>
  - (b) By analogy with Article 121 (3) of the United Nations Convention on the Law of the Sea, the *potential* status of the island as to:
    - (i) demography,
    - (ii) economic life.

<sup>250</sup> Para. 194.

<sup>252</sup> Para. 195.

<sup>254</sup> *Ibid.*, para. 186.

<sup>255</sup> Paras. 7, 184 and 197; see also Judge Schwebel in the *Tunisia-Libya* case.

<sup>256</sup> Cf. the Court's attitude to such variables in the *Tunisia-Libya* case, para. 107.

<sup>251</sup> Para. 192.

<sup>253</sup> *Anglo-French* case, para. 198.

- (c) According to the *Tunisia-Libya* case, the area of the island.<sup>257</sup> (This may be an expression of (b), assuming the potential of a square kilometre of land to be a constant.)

As has been argued here, the principles of coastal configuration receive much of their weight because they protect and further the reasons which lie behind the continental-shelf regime. Why then do they receive less weight in the case of dependent islands? First, although populated islands have security interests, they are less urgent than those of the mainland of a sovereign State where its administrative 'nerve centre' lies. Thus, in the *Anglo-French* case, the superior French security interests in the southern half of the Channel are acknowledged.<sup>258</sup> Secondly, as to rational exploitation, though an island may be closest to an area of sea-bed, it may be better to think in terms of the mainland coasts, since the island itself will need mainland support if it is to act as a viable base for operations. Thirdly, it has been shown that the regime of the continental shelf developed in international law because it guaranteed all coastal States a fair share of sea-bed with concomitant prospects of economic and political advantage. What this fair share is which a State expects is dictated by the extent of its coastline and the area of sea-bed lying off it. It would strike at this vital factor which underpins support for the shelf regime if the solution suggested by the mainlands of the delimiting States were to be markedly upset by the presence of small islands. Thus, as already noted, the Court in the *Anglo-French* case speaks of the disruption caused by the Channel Islands, stating that, if they did not exist, the parties would receive 'broadly equal or at least broadly comparable' areas of shelf,<sup>259</sup> because of the 'broad equality of the coastlines of their mainlands'.<sup>260</sup> Therefore the weight given to the principles of coastal configuration when applied to islands is markedly less than when applied to the mainlands of sovereign States.

These same factors—and these same arguments—seem to apply also to 'minor coastal projections' and 'exceptionally long promontories'. The Court in the *North Sea* cases lists them with islands as features which create wrong results if the principles of coastal configuration are applied to them with the weight appropriate for mainland coasts.<sup>261</sup> Moreover, in the *Anglo-French* case, the Court of Arbitration, whilst considering the weight to give the Scillies and Ushant, treats them as extensions of the mainlands of Cornwall and Finistère.<sup>262</sup>

#### 4. *Comment*

As will be discussed below, there is an inherent tension between the

<sup>257</sup> Para. 128.

<sup>258</sup> Para. 188: these interests are said not to be decisive; but it is to be noted that they were argued by France and the United Kingdom as an independent equitable element in the delimitation, tied to submarine navigation routes, etc.

<sup>259</sup> Para. 182.

<sup>260</sup> Para. 183.

<sup>261</sup> Paras. 57 and 89.

<sup>262</sup> Para. 249; see the second award in the *Anglo-French* case, para. 91.

principle of coastal configuration and the principle of proportionality.<sup>263</sup> It may also be noted that there is something of a tension between the two ways of reflecting coastal configuration. For the principle of 'closest proximity' and the allied method of equidistance 'take full account of almost all variations in the relevant coastlines', as the International Court observes in the *Tunisia-Libya* case.<sup>264</sup> It might be said that they are microgeographic in focus because of their attention to detail. In contrast, the principle of perpendicular projection of the coastal front and the allied method of a line perpendicular to the general direction of the coast are macrogeographic. It can only be meaningfully applied to a coast if a line is drawn expressing the 'general direction' thereof on which the perpendicular projection or delimitatory line can be based. Some measure of appreciation is therefore required in assessing the general line of the coast, which is necessarily an abstraction from detail. So the International Court in the *Tunisia-Libya* case talks of the 'direction of the coastline',<sup>265</sup> the 'general direction' of the coast<sup>266</sup> and so on.

The tension may only be minimal. However, there is scope for a wide and subjective interpretation of the general direction of the coast. (Compare the case of straight baselines.) In the *Tunisia-Libya* case, the Court in effect reduces the coastlines involved to two straight lines;<sup>267</sup> and it is difficult to disagree with Judge Gros when he says that 'the geographical configuration of the coasts relevant to the delimitation was left on one side, and the examination proceeded by estimates of directions . . . with *a priori* postulates being substituted for actual cartographic fact'.<sup>268</sup> If delimitatory law becomes so abstract, there is a danger that it will cease to perform its function of preserving order as the scope for disagreement and dispute increases.

(b) *Following Geological Configurations: Natural Prolongation as a Delimitatory Principle*

That there is a single and absolute rule based upon the geologically defined concept of natural prolongation has already been shown not to be the case.<sup>269</sup> Good evidence exists in the jurisprudence, however, for the existence of a 'primary' rule, operating on major geological or geomorphological discontinuities, prior to the operation of equitable principles.<sup>270</sup> At the same time there is good evidence, and arguments of principle and policy, pointing the other way. Besides this possible primary rule,

<sup>263</sup> Section V (d) 1.

<sup>264</sup> Para. 126.

<sup>265</sup> Para. 120.

<sup>266</sup> Para. 122.

<sup>267</sup> Judge Jiménez de Aréchaga differs in preferring three: paras. 112 and 113.

<sup>268</sup> Ibid., para. 15; Grisel notes it is often impossible to establish the general direction of the coast, and the result is often dependent upon the scale of map used and how much coastline is taken into consideration; loc. cit. above (p. 147 n. 98), at p. 586.

<sup>269</sup> Section III (c) 2. above.

<sup>270</sup> Section IV (b) above.

Professor Brown believes that considerations of geology and geomorphology have no relevance, and that physical features on a continuous geological shelf which do not constitute major discontinuities have no effect on the delimitatory process, even if they are fairly substantial features.<sup>271</sup> However, there is ample evidence for the delimitatory relevance of the physical nature of the sea-bed in another mode, besides that of a primary rule. For the International Court in the *North Sea* cases lists the geology of the sea-bed as one of the 'aspects' of natural prolongation—one of the delimitatory principles.<sup>272</sup> Similarly, as described *in extenso* above,<sup>273</sup> the Court in the *Tunisia-Libya* case states that 'geomorphological configurations of the sea-bed . . . may be taken into account as a circumstance relevant for an equitable delimitation',<sup>274</sup> even if they do not 'interrupt the continuity of the continental shelf' so as to spring the operation of the primary rule.<sup>275</sup> 'Relevant circumstances' are clearly the factual data to which the equitable principles apply, as has been shown above;<sup>276</sup> and, indeed, the Court lists geomorphology alongside other 'circumstances' such as coastal configuration which are clearly the subject of principles.<sup>277</sup> Furthermore, it may be noted that, in the *Anglo-French* case, the United Kingdom sought to invoke the Hurd Deep and the Hurd Deep Fault Zone as a possible boundary whilst admitting that the area was characterized by its essential geological continuity, so that the primary rule could not be applied.<sup>278</sup>

The International Court of Justice in the *Tunisia-Libya* case gives the clearest indication of how this delimitatory principle works. For the Court contemplates that a geomorphological feature, such as a submarine trough or ridge, may provide a suitable boundary line only when the solution which it suggests accords closely with the answer suggested by the other principles of delimitation. The Court thus remarks that 'the identification of [the] natural prolongation may, *where the geographical circumstances are appropriate*, have an important role to play in defining an equitable delimitation'.<sup>279</sup> The reference to 'geographical circumstances' is a clear signification of the principles of coastal configuration and the principle of proportionality.

Accordingly, in its treatment of the Tripolitanian Furrow,<sup>280</sup> the Court considers this feature as a possible 'relevant circumstance', but decides that it can have no effect upon the delimitation, since it is 'comparatively near' the Libyan coast, 'running roughly parallel' thereto. To give effect to the principle in relation to this feature would therefore conflict with the much weightier principles of coastal configuration, as the resulting boundary would cut across in front of the Libyan coast, ignoring both

<sup>271</sup> Loc. cit. above (p. 147 n. 102), at pp. 477-9.

<sup>272</sup> Paras. 45, 95 and 101 (D) (2).

<sup>273</sup> pp. 153-4.

<sup>274</sup> Para. 80.

<sup>275</sup> Para. 68.

<sup>276</sup> pp. 153-4.

<sup>277</sup> Paras. 76-80 and 81.

<sup>278</sup> Paras. 106 and 107.

<sup>279</sup> Para. 44 (emphasis added); see also para. 43.

<sup>280</sup> Para. 80; and see p. 156 above.

perpendicularity and equidistance.<sup>281</sup> The Court in the *North Sea* cases also seems to contemplate a limited role for this principle, stating only that 'it *can be useful* to consider the geology of [the] shelf'.<sup>282</sup>

The Court of Arbitration in the *Anglo-French* case holds that the Hurd Deep, although it constitutes 'so substantial a feature',<sup>283</sup> is incapable of 'exercising a material influence on the determination of the boundary',<sup>284</sup> or justifying the rejection of other methods of delimitation based upon coastal geography.<sup>285</sup> However, the Court does hint that the axis of the Hurd Deep might have been employed as a boundary line if the equities of the geographical situation had suggested a delimitation in its close environs;<sup>286</sup> and Professor Bowett, commenting on the *Anglo-French* case, makes a similar tentative suggestion on the state of the law,<sup>287</sup> with which Professors Collins and Rogoff agree.<sup>288</sup>

The reason why the principle of following the geomorphological configurations of the sea-bed is of such little force would seem to be the same as the ones which have been argued above as casting doubt on the primary rule of geological natural prolongation: namely, the ability of the principle, if it were to receive more weight, to create results conflicting with the very rationale of the continental-shelf regime. This is the clear thrust of the argument of the Court of Arbitration in the *Anglo-French* case at paragraph 108<sup>289</sup> and in the *Tunisia-Libya* case at paragraphs 41 to 44.<sup>290</sup> What force the principle in fact possesses would seem to derive from the fact that a geomorphological feature may provide a boundary line which is certain and easy to ascertain in practice; and it may also facilitate rational exploitation, since troughs and deeps constitute natural barriers to pipelines and indicate the unlikelihood of a common deposit stretching across a boundary drawn along them.

If the principle is indeed of such little weight, it might be argued that it is really but a method of delimitation, just like prolonging the land boundary, which can be used when it yields a delimitatory line within the parameters of a solution suggested by the (other) equitable principles. However, this analysis is to be rejected. For the International Court has clearly treated the concept of following the physical configurations of the sea-bed as a principle; and it appears that it may influence, albeit to a limited extent, the equitable solution of the case. Yet, if the concept is a principle, it is also a method of delimitation: besides influencing the answer to the question of where the delimitation is to be made, it also serves to provide a practical means of drawing the boundary line on the map. The close alliance between certain principles and certain methods is once again apparent.<sup>291</sup>

<sup>281</sup> p. 156 above.

<sup>283</sup> *Tunisia-Libya* case, para. 66.

<sup>285</sup> Para. 108.

<sup>287</sup> Loc. cit. above (p. 152 n. 129), at p. 17.

<sup>289</sup> See pp. 154-5 above.

<sup>291</sup> See p. 141 above.

<sup>282</sup> Para. 95 (emphasis added).

<sup>284</sup> Para. 107.

<sup>286</sup> Ibid., last sentence.

<sup>288</sup> Loc. cit. above (p. 159 n. 183), at p. 41.

<sup>290</sup> See p. 156 above.

(c) *The Unity of Deposits*

In its list of equitable principles, the International Court in the *North Sea* cases mentions the 'unity of deposits'.<sup>292</sup> However, it can be argued that there is no principle of international law militating for anything more than a very minor local adjustment to maintain such unity. Knowledge of submarine deposits is very incomplete,<sup>293</sup> and a boundary drawn to avoid splitting known deposits (even if it can be drawn with any of the requisite degree of certainty) may only succeed in splitting deposits still to be discovered, as Judge Jessup observes in the *North Sea* cases.<sup>294</sup> Moreover, such a principle, if taken beyond minor local adjustments, would be internationally unacceptable. It might even create results conflicting with the rationale of the shelf regime in extreme cases. Indeed, the International Court itself states that the unity of deposits question does not constitute 'anything more than a factual element which it is reasonable to take into consideration in the course of negotiations for a delimitation'.<sup>295</sup> Judging by the examples it cites, the Court seems to contemplate the negotiation of a provision determining how to deal with the exploitation of known common deposits, and how to solve the problem of ones subsequently discovered. This impression is confirmed by the judgment of Judge Ammoun;<sup>296</sup> and, in fact, the second articles of the ensuing delimitatory agreements between the Federal Republic of Germany and Denmark and the Federal Republic and the Netherlands reflect this interpretation.<sup>297</sup>

Professor Brown concludes that the existence of a deposit is not a factor which can influence the delimitation of continental-shelf boundaries.<sup>298</sup> However, the door is definitely not shut to local adjustments. For the location of known deposits is mentioned in the *dispositif* in the *North Sea* cases;<sup>299</sup> and the Court in the *Tunisia-Libya* case states that 'the presence of oil-wells in an area to be delimited . . . may, depending on the facts, be an element to be taken into account in the process of weighing all the relevant factors to achieve an equitable result'.<sup>300</sup> Collins and Rogoff also note that the boundary drawn between the Federal Republic of Germany and Denmark deviated from pure geographical solutions in order to permit Denmark to retain areas where Danish concessionaires had drilled.<sup>301</sup>

(d) *Proportionality*

The term 'proportionality' may be found in two senses in the jurisprudence. Its apparent usage to refer to the weight conferred upon the

<sup>292</sup> Para. 97.<sup>294</sup> p. 78.<sup>296</sup> *Ibid.*, p. 149.<sup>297</sup> Lay, Churchill and Norquist, *New Directions in the Law of the Sea*, vol. i (1973), pp. 190 and 194.<sup>298</sup> *Op. cit.* above (p. 151 n. 124), at p. 67.<sup>299</sup> Para. 101 (D) (2): the list of equitable principles (see p. 149 above).<sup>300</sup> Para. 107; this merges into the question of historic rights and their relationship with *ipso jure*, *ab initio* title to the continental shelf, which is beyond the scope of this article.<sup>301</sup> *Loc. cit.* above (p. 159 n. 183), at p. 41, although there are other explanations for this.<sup>293</sup> See esp. the *Jan Mayen Island* case.<sup>295</sup> *North Sea* cases, para. 97.

principles of coastal configuration when applied to different coastlines has already been discussed.<sup>302</sup> The term is also used to refer to the concept of conferring sea-bed upon delimiting States at a ratio to the lengths of their respective coastlines which is equal as between those States.

Although a lengthy discussion of the principle of proportionality is not in order in an article on natural prolongation, some account of it must be given: to complete the picture of the system of delimitatory principles; concomitantly, to show how to achieve natural prolongation in the sense of the delimitatory result; and also to put in context the other senses of natural prolongation which have been found.

### 1. *A principle*

The concept of proportionality can be found as a delimitatory principle alongside coastal configuration and geological configuration in the *North Sea* cases.<sup>303</sup> The International Court seems to have conceived of this principle as having great weight—so great indeed that the Court contemplates the principle overriding the solution suggested by the principles of coastal configuration considered on their own.<sup>304</sup> Moreover, in the formulation of the principle in paragraph 98, it is said that ‘a delimitation effected according to equitable principles ought to bring about’ a result whereby the delimiting States are seen to receive fair shares of the sea-bed in the area delimited, given their respective frontage thereon.

There is, therefore, an inherent tension between the principles of proportionality and coastal configuration; for a fair share might not be what the principles of coastal configuration point to, but the principle of proportionality seeks to ignore this. However, the weight of the principle is not so great that it will inevitably prevail in a conflict with the principles of coastal configuration in such a way that positive similarity of treatment will necessarily be accorded to delimiting States: that is, the law does not countenance the complete ‘refashioning of geography’.<sup>305</sup> Rather, the Court seems to think of the principle as a way to ensure that, in terms of ratio of sea-bed to coastline, the delimitation does not create great disparities between delimiting States.

First, the International Court formulates the principle as a tool of great imprecision. The principle is said to militate for a ‘reasonable’ degree of proportionality.<sup>306</sup> The length of the coastline is to be measured according to its general direction, using such vague measuring lines as a single coastal front. Moreover, to apply this idea involves placing a seaward limit on the area to be taken into account, and this may involve hypothesizing future

<sup>302</sup> See section V (a) 3. (ii) above.

<sup>303</sup> Paras. 98 and 101 (D) (3); see also Blecher, loc. cit. above (p. 152 n. 131), at p. 77, and Rhee writes that proportionality ‘should play a positive role as a guiding principle . . . in the realm of equitable principles’: loc. cit. above (p. 142 n. 61), at p. 619.

<sup>304</sup> Para. 91, discussed at p. 166 above; also Blecher, loc. cit. above (p. 152 n. 131), p. 85.

<sup>305</sup> *North Sea* cases, para. 91; also *Tunisia-Libya* case, para. 79.

<sup>306</sup> *North Sea* cases, para. 98.

delimitations involving other States, as it did in the *North Sea* cases themselves—lines which can only be guessed at, and which might subsequently not be used.<sup>307</sup>

Secondly, the Court contemplates that, although the principle of proportionality may override the solution suggested by the principles of coastal configuration considered without reference to proportionality, these principles are still very much operative. For it would conflict with the rationale of the continental-shelf regime if a State were to receive its proper proportion of sea-bed anywhere: its orientation must be related to the coast in a way consistent with the reasons constituting this rationale. As the principle of proportionality begins to achieve its purpose—of conferring a comparable amount of sea-bed upon each party in ratio to the lengths of their respective coastlines—so the urgency of the principle decreases. At the same time, the principles of coastal configuration applied to the other State—the one favoured by a solution ignoring proportionality—will have become more urgent and comparatively weightier as proportionality pushes the boundary closer to and across in front of that State. Given the imprecision of the principle of proportionality, it would seem that it will lose its weight and be overridden by principles of coastal configuration very quickly once some measure of proportionality is achieved.

Thirdly, the policy goals behind the principle of proportionality would seem to suggest that the principle operates in this way, being aimed more at the avoidance of great disproportion than at the achievement of a positively proportional result. For, as has been noted,<sup>308</sup> the speed with which the idea of coastal State rights over the sea-bed was internationally accepted is very largely explicable in terms of the prospect of considerable resources, wealth and political advantage which it offered to all coastal States. All States wished for the best possible share, and their expectations were defined by the sea-bed lying off their coasts and the dimension of their frontage on to this area. International support for the regime and the law relating to its delimitation would be considerably threatened if, of two States giving on to the same area of sea-bed, one were to receive a considerably greater proportion of sea-bed in relation to its frontage upon this area than the other—especially in view of the number of States in positions where, if principles of coastal configuration alone were applied, a proportionally much smaller area of sea-bed would be allotted to them than to their not so ‘geographically disadvantaged’ neighbours. Fairness must therefore be seen to be done. However, this does not necessitate the pursuit of absolute comparative proportionality. It is rather dissimilarities—or at least grossly disproportionate results—between neighbouring States fronting on common sea-bed areas which must be avoided. This is especially the case, given that there will always be differences between States macrogeographically speaking; for some States in some

<sup>307</sup> Para. 101 (D) (3): the line there hypothesized was that of an Anglo-German delimitation (Judge Jessup, p. 81).

<sup>308</sup> See pp. 135–6 above.

parts of the world front on expansive areas if sea-bed, and others in other parts do not. Nauru, for instance, will receive many more square miles of sea-bed per mile of coastline than Sweden.

## 2. *A touchstone of equitableness*

This view of proportionality seems to be rejected by the International Court in the *Tunisia-Libya* case. The concept of proportionality is retained, consistently with the jurisprudence of 1969.<sup>309</sup> However, its role seems to have been increased: the attainment of *positive* similarity of treatment seems to be the aim, rather than the *avoidance* of marked *dissimilarity* of treatment. Thus, proportionality is said to constitute the 'touchstone' of the 'equitableness' of a delimitation—or, according to the French translation, '*la pierre de touche de l'équité*'.<sup>310</sup>

In accordance with this identification of proportionality and equity, the concept of proportionality is said to be a 'test'.<sup>311</sup> By itself, this is of little significance; for, in the *Anglo-French* case, there can be said to be a 'test'—to see if lines drawn to reflect geographical features create 'disproportion'—yet it is clear that the Court of Arbitration believes the notion of proportionality is playing a different and a lesser role than it played in the *North Sea* cases.<sup>312</sup> However, in the *Tunisia-Libya* case, the International Court, having stressed proportionality in the passages cited above, proceeds to apply this 'test' at the very end of the judgment. This would seem to point to two conclusions. First, whereas, in the *North Sea* cases, proportionality is but one of the elements in the crucible which contributes to an equitable solution, according to the *Tunisia-Libya* case, delimitation has become a two-stage process, rather than one (three-stage, rather than two, if the primary rule does exist): the *prima facie* delimitatory solution yielded by the first stage must be tested against, and must respect, proportionality for the delimitation to be equitable and in accordance with international law.<sup>313</sup> Hence its designation as 'a touchstone of equitableness'. Secondly, whereas the avoidance of any marked dissimilarity in treatment is the result of the application of proportionality in the *North Sea* cases, following the *Tunisia-Libya* case, it will be the achievement of positive similarity. This follows from the fact that, if the concept is applied as a separate stage and at the end of the delimitatory process—correcting any solution which does not achieve proportionality—then its application will not be tempered through the application of the other delimitatory principles alongside it, as occurs in the one-stage delimitatory process of the *North Sea* cases.<sup>314</sup>

It is worthy of note that Judge Gros, in his dissenting opinion in the

<sup>309</sup> Quéneudec, loc. cit. above (p. 149 n. 110), at p. 210.

<sup>310</sup> *Tunisia-Libya* case, para. 108.

<sup>311</sup> Paras. 97, 103 and 131.

<sup>312</sup> *Pace* Feldman, loc. cit. above (p. 147 n. 101), at p. 232; see section V (a) 3. (ii) above, and section V (d) 3. below.

<sup>313</sup> See Feldman, loc. cit. above (p. 147 n. 101), at p. 238.

<sup>314</sup> See pp. 166 and 177 above.

*Tunisia-Libya* case, observes that the majority of the International Court has given proportionality a much greater role than it received in the *North Sea* cases.<sup>315</sup>

One argument that may be raised against this interpretation is that it fails to take account of the fact that the other equitable principles noted above still apply to determine the equitable solution. Thus, the International Court treats proportionality as 'an aspect of equity'<sup>316</sup>—a principle contributing to the equitable result along with the other equitable principles—and it is said to be 'taken into account' as an 'element' in the decision therewith.<sup>317</sup> It might be contended that the concept therefore functions just as it is said to do in the *North Sea* cases.

These passages are not inconsistent with the concept of proportionality as 'a touchstone of equitableness', for the other principles continue to operate to help determine the solution. However, the essential difference is that delimitation has become a two-stage process, rather than one-stage. The body of equitable principles is applied, which suggests a delimitatory solution. Then proportionality is applied to test this solution, and to revise it if necessary. Proportionality and equitableness are not equivalents, therefore, since other elements contribute to an equitable solution; but there must be proportionality if there is to be equitableness.

A second, and more powerful, argument against this interpretation may be based upon the way proportionality is actually applied in the *Tunisia-Libya* case. For, to begin with, the concept is formulated in the same imprecise manner as in the *North Sea* cases.<sup>318</sup> Secondly, in assessing the proportionality of the delimitation suggested by the other delimitatory principles, the Court does not take into account how future delimitations with Malta might affect the amounts of sea-bed each of the parties receives in the relevant area.<sup>319</sup> Yet this is a factor likely to disrupt any nice calculations made.<sup>320</sup> Thirdly, and most notably, the actual solution adopted is an extremely vague one. The Court arbitrarily draws a set of lines as seaward limits in order to make its calculations;<sup>321</sup> and, as for its calculations, the length of its coastline suggests that Tunisia should receive about two and a quarter times the area of shelf Libya ought to receive, and yet it received only about one and a half times the amount.

It is possible to interpret this result in two ways. First, it might be argued that the principle of proportionality is not as weighty as the remarks of the Court might otherwise seem to suggest. The second explanation places much greater stress on proportionality. For, it might be

<sup>315</sup> Paras. 15 and 17; and see Zoller, loc. cit. above (p. 138 n. 36), at p. 664.

<sup>316</sup> Para. 131 (emphasis added).

<sup>317</sup> Para. 103.

<sup>318</sup> Paras. 103 and 133 (B) (5).

<sup>319</sup> Paras. 130 and 131.

<sup>320</sup> Brown remarks that proportionality can only be meaningfully applied if one takes into account the actual or prospective boundaries of the shelf pertaining to other States in the area under consideration; since it is only by reference to the boundary of one of the parties with a third State that one can calculate the area of that State's continental shelf: op. cit. above (p. 151 n. 124), at p. 50; loc. cit. above (p. 147 n. 102), at p. 523.

<sup>321</sup> Para. 130; for the landward limits of the relevant area, see para. 75.

argued, if there is a change in the direction of the coast, so that the angle formed by a geometrical construction thereof is less than  $180^\circ$ , then there is an area of sea-bed directly off two coasts of the same State. If the land does shape the expectations of States as to the area of sea-bed they are to receive, it cannot be expected that one of these coasts may be used to confer jurisdiction over the area in question, and the other put to use elsewhere to confer jurisdiction over other areas of sea-bed, so to speak. Rather, one coast duplicates the effects of the other. Moreover, the area of sea-bed off a given length of coast may vary greatly along its length, and with it the ratio of sea-bed to coastline suggested by proportionality. A State fronting upon a large ocean expects more sea-bed for a given mile of coastline than a State fronting upon a small semi-enclosed sea; and similarly from one part of a coast to another. Thus, in the *Anglo-French* case, the United Kingdom and France received a great area of sea-bed for each mile of their coastlines in Cornwall and Finistère, but much less around Dover and Calais. So proportionality is not applied simply in relation to the sea-bed off the coast of the delimiting States and in relation to the lengths of their respective coasts. Rather, it is applied in relation to a given length of coast and the area of sea-bed off it. Accordingly, in the *Tunisia-Libya* case, the Court only considers the 'relevant area', as defined in paragraph 75. The concept is, therefore, more precise than is suggested in the *North Sea* cases, where the whole coastal front of a State is mentioned. It is also linked with perpendicularity, though construed in a broader sense, as is indicated by the definition of the 'relevant area' to which the test is applied in the *Tunisia-Libya* case.<sup>322</sup>

If the principle of proportionality is construed thus, then the ratio settled on in the *Tunisia-Libya* case seems more balanced; for the two Tunisian coasts tend to duplicate each other. If this explanation of the delimitatory result in that case is correct, the principle of proportionality would seem to be of greater weight than the ratio accepted by the Court might otherwise suggest. Indeed, that the principle is so important, aiming at positive similarity of treatment, explains the Court's affirmation of the necessity to draw the boundary line which it has in mind—despite the fact that the *compromis* reserves the actual plotting thereof to the parties—so that it might 'arrive at a reasonably clear conception of the extent of the areas on each side of the eventual [official] line'.<sup>323</sup>

### 3. *The Anglo-French problem*

As has already been observed,<sup>324</sup> the Court of Arbitration in the *Anglo-French* case distinguishes two senses of proportionality, and holds that 'the criterion of a reasonable degree of proportionality between the areas of continental shelf and the lengths of the coastlines', adopted by the International Court in the *North Sea* cases, is not 'one applicable in all cases': 'on the contrary, it was the particular geographical situation of

<sup>322</sup> Para. 130; cf. paras. 74 and 75.

<sup>323</sup> Para. 108.

<sup>324</sup> p. 169 above.

three adjoining States situated on a concave coast which gave relevance to that criterion in those cases'.<sup>325</sup> The principle of proportionality outlined above is, therefore, seen as an aspect of equity, contributing to the equitable solution along with the other equitable principles; but it is only operative or applicable in certain limited geographical circumstances. Those circumstances did not exist in the *Anglo-French* case. This is a major limitation on the principle of proportionality, and it has been welcomed by several authors.<sup>326</sup> McRae has even sought to argue that the *Anglo-French* case did not narrow the scope of that principle, since the principle was stated solely in relation to the circumstances before the Court in the *North Sea* cases, and can only be meaningfully applied in such situations.<sup>327</sup>

As has already been discussed, the Court of Arbitration in that case developed a second sense of the concept of proportionality. This second sense, unlike the first, has nothing to do with the idea of a ratio between lengths of coastlines and areas of sea-bed. Moreover, it seems to have a lesser role in the delimitatory process. For the Court states that it is not a rule or a principle of delimitation,<sup>328</sup> and, as Zoller remarks, the Court of Arbitration reverses the term, putting it in the negative form of 'disproportionality', 'pour mieux en cerner la signification'.<sup>329</sup> 'Disproportionality' is rather 'a factor to be taken into account in appreciating the effects of geographical features on the equitable or inequitable character of a delimitation'.<sup>330</sup>

The Court seems to think that it works in the following fashion. The principles which reflect the configuration of the parties' coastlines may suggest a certain solution if these coastal configurations are examined in a general way. However, if these principles are then applied with the same force to 'particular coastal configurations or individual geographical features', then these features might distort the delimitation otherwise suggested,<sup>331</sup> so that the parties no longer receive the comparable areas of continental shelf which they would otherwise have received.<sup>332</sup> 'Disproportionality' is the criterion, or test, by which it is possible to tell whether the distortion caused by these features is such as to make a resulting delimitation inequitable.

Like the principle of proportionality, disproportionality is an aspect of the overall question of what is an equitable solution. However, in the crucible of equitable principles, proportionality as described in the *North Sea* cases is an independent principle, contributing to an equitable solution; whereas disproportionality is denied such an 'autonomous' role by the Court of Arbitration, as Zoller observes.<sup>333</sup> Rather, it is parasitic upon principles relating to geographical circumstances. Moreover, to use

<sup>325</sup> Para. 99.

<sup>326</sup> e.g. Brown, loc. cit. above (p. 147 n. 102), at pp. 509 and 530; Bowett, loc. cit. above, (p. 152 n. 129), at p. 17.

<sup>327</sup> *Canadian Yearbook of International Law*, 19 (1981), p. 287.

<sup>328</sup> Para. 98; Brown, loc. cit. above (p. 147 n. 102), at p. 509.

<sup>329</sup> Loc. cit. above (p. 143 n. 68), at p. 383.

<sup>330</sup> *Anglo-French* case, para. 99.

<sup>331</sup> Ibid., para. 100.

<sup>332</sup> Ibid., para. 101.

<sup>333</sup> Loc. cit. above (p. 143 n. 68), at p. 383.

a distinction made by Rhee,<sup>334</sup> proportionality plays a positive role in the delimitation process, striving to achieve a certain result; whereas disproportionality is 'merely a negative criterion to test whether a line is equitable or inequitable'. It sounds the alarm, as it were, that the geographical principles cannot be applied with full force to particular configurations or features. It must be added that this test applies only to the result of the operation of the geographical principles, and not to the result of all the equitable principles.

However, this conceptual wedge which has been driven between the two ideas is not without its weaknesses. For if disproportionality constitutes a test of the equitableness of a delimitation according to geographical principles, then what is it that makes a delimitation fail the test? Is it not that lesser geographical features upset a proportionate solution which is suggested by the general configuration of the coasts of the parties? For, in the *North Sea* cases, the International Court adverts to the necessity of abating the 'disproportionately distorting effect' of a line giving 'full effect' to 'islets' and 'minor coastal projections', since such a line disturbs the 'equal division' of the area between opposite States otherwise effected by equidistance.<sup>335</sup> Similarly, in the *Anglo-French* case, the Court of Arbitration, having formulated the concept of disproportionality, states that it is 'a question of remedying the disproportionality and inequitable effects produced by particular geographical configurations or features in situations where otherwise the appurtenance of *roughly comparable attributions* of continental shelf to each State would be indicated by the geographical facts'.<sup>336</sup> Moreover, in deciding whether to give 'full' or 'modified' effect to the 'natural prolongation' of the Channel Islands, the Court, noting the equal division resulting from a median line if the Islands did not exist, proceeds to state that 'the substantial diminution of the area of continental shelf which would otherwise accrue to France' through giving 'full effect' to the Islands is '*prima facie*, a circumstance creative of inequity and calling for a method of delimitation that in some measure redresses the inequity'.<sup>337</sup> Thus the criterion of disproportionality is a test of whether a proportionate solution is upset by lesser geographical features. It is true that 'nice calculations of proportionality' are eschewed;<sup>338</sup> that the concept is a 'broad' idea;<sup>339</sup> and, as Professor Bowett writes, 'a very general view' of 'approximate' or 'broad' equality is taken by the Court.<sup>340</sup> However, it seems clear that proportionality, albeit in a general sense, is at work; and Blecher is right to say that the Court of Arbitration, despite its protestations, does not forget that concept.<sup>341</sup>

<sup>334</sup> Loc. cit. above (p. 142 n. 61), at p. 619.

<sup>335</sup> Para. 57 (emphasis added).

<sup>336</sup> Para. 101 (emphasis added).

<sup>337</sup> Para. 196.

<sup>338</sup> Brown, loc. cit. above (p. 147 n. 102), at p. 510; Blecher, loc. cit. above (p. 152 n. 131), at p. 74.

<sup>340</sup> Loc. cit. above (p. 152 n. 129), at p. 18.

<sup>341</sup> Loc. cit. above (p. 152 n. 131), at p. 77.

<sup>338</sup> Paras. 250 and 27.

Disproportionality, therefore, warns if proportionality has been upset, and also informs of the extent of the resulting inequity.<sup>342</sup> Is it then the case that, having found inequity in the disruption of proportionality, it then seeks to *achieve* proportionality in order to restore equity? If so, then disproportionality would seem to be merely a weaker and a vaguer form of the principle of proportionality, microgeographic in focus rather than macrogeographic.<sup>343</sup> However, when applying disproportionality to the Atlantic region, the Court of Arbitration undertakes no measurements of the lengths of coasts or areas of sea-bed, and there is no talk of ratios. The Court sets no limits to the area under consideration—a prerequisite for calculations of proportionality, as the International Court states in the *Tunisia-Libya* case.<sup>344</sup> Indeed, it refuses to predict the line of an Anglo-Irish delimitation,<sup>345</sup> a factor vital to the fairness of a proportionate solution *vis-à-vis* the United Kingdom.<sup>346</sup> Rather, the Court reiterates its previous distinction of proportionality and disproportionality, and rejects any ‘nice calculations of proportionality’.<sup>347</sup>

It seems to be the case that disproportionality is rather in the nature of an alarm-bell for the delimitator. If the application of geographical principles disrupts a proportionate solution, conceived broadly, then disproportionality draws attention to how these principles have been applied to particular coastal features, such as projections and islands, and prompts the delimitator to enquire as to whether these features actually should receive ‘full effect’.<sup>348</sup> This enquiry is directed to the weighting factors described above;<sup>349</sup> and it is these factors which determine whether the features in question should in fact receive ‘full effect’, and, if not, how much effect they should receive.<sup>350</sup> Thus, in the Channel Islands region, the Court of Arbitration states that to give ‘full effect’ to the Islands would disrupt the broadly proportionate solution suggested by the mainlands, ignoring the Islands, and that this ‘prima facie’ suggests a different solution which ‘*in some measure* redresses the inequity’;<sup>351</sup> but it is in fact the consideration of the circumstances relating to the Islands which leads to their special treatment and which determines how far their effect should be ‘modified’.<sup>352</sup>

<sup>342</sup> *Anglo-French* case, para. 250.

<sup>343</sup> See Brown, *op. cit.* above (p. 151 n. 124), at p. 65.

<sup>344</sup> Para. 130.

<sup>345</sup> Paras. 27 and 250.

<sup>346</sup> See p. 179 n. 320 above; and *North Sea* cases, para. 101 (D) (3).

<sup>347</sup> Para. 250; see also para. 27.

<sup>348</sup> Collins and Rogoff thus write that disproportionality makes the line drawn legally suspect and leads the delimitator to consider alternative lines: *loc. cit.* above (p. 159 n. 183), at p. 35.

<sup>349</sup> See pp. 169–70 above.

<sup>350</sup> Thus Zoller is right to say that one does not start with an examination of the population of islands, and so on, to see if they should receive special treatment: it is the effects which they would otherwise produce which directs one to consider if they merit special treatment: *loc. cit.* above (p. 143 n. 68), at p. 403.

<sup>351</sup> Para. 196 (emphasis added).

<sup>352</sup> Para. 198: they fail to justify ‘full effect’ for the Islands, but they are sufficient to invalidate the six-mile enclave solution suggested by France; cf. McRae, who affirms that it is not disproportionality on its own which determines whether geography creates inequity and therefore the need for adjustment: *loc. cit.* above (p. 181 n. 327), pp. 298–9.

The reason why it is the disruption of broadly proportionate solutions which draws the delimitator's attention to the weight to be given to the principles of coastal configuration is that a substantial part of the reason for weighting islands and promontories less seems to be that these features will otherwise tend to negate the goal behind the continental-shelf regime of a fair share for all coastal States, which is expressed through the idea of proportionality.

## VI. CONCLUSION

Therefore, seven different senses of the term 'natural prolongation' may be found in the jurisprudence, performing different normative roles:

- (1) as a single and absolute rule of delimitation relating to the geology and geomorphology of the sea-bed (the argument of Libya in the *Tunisia-Libya* case);
- (2) as a primary delimitatory rule, operating prior to the rule enjoining the application of equitable principles and dispensing with it if its conditions of application are fulfilled—if such a major geological or geomorphic feature exists that there can be said to be two separate physical continental shelves, one appertaining to one State and the other to the other State (the *Anglo-French* and *Tunisia-Libya* cases);
- (3) as a delimitatory principle, of not very great weight, operating on lesser configurations of the sea-bed to suggest a delimitatory line, but only prevailing if this feature substantially coincides with the line suggested by the other equitable principles (the *North Sea* cases, the *Tunisia-Libya* case and possibly the *Anglo-French* case);
- (4) as a delimitatory principle, of very great weight, which operates upon the configuration of the coast and projects it seawards in a fashion perpendicular to the line of the coastal front, thus suggesting a delimitatory line perpendicular to that coastal front at the point where the territorial sea boundary of the delimiting States ends (Judge *ad hoc* Jiménez de Aréchaga, in the *Tunisia-Libya* case, uses 'natural prolongation' thus; otherwise, this idea appears without the terminology of 'natural prolongation');
- (5) as the area of sea-bed which all the delimitatory rules and principles, when they have been applied to the case, confer as a result on each State: that is, the delimitatory result (the *North Sea* cases and the *Anglo-French* case);
- (6) as the basis of the entitlement of the coastal State to the sea-bed areas off its coasts, as distinct from a delimitatory rule or principle; in this sense, it refers to the policy reasons which justify this entitlement, and to the area of sea-bed over which these reasons suggest that the coastal State has a legitimate interest (all the cases);

- (7) in a non-normative context, the term can also be found, in a geological and geomorphological sense, referring in general terms to the area over which a coastal State has sovereign rights under international law: that is, the object and location of those sovereign rights (all the cases).

The account which has been given of the delimitatory principles and their operation has illustrated that the reasoning and the results of the cases are perfectly consistent with giving 'natural prolongation' the meanings contended for. The account has also shown how to achieve natural prolongation in its fifth sense—the result of the operation of delimitatory law, and not the means to achieve the solution.

Furthermore, the account given emphasizes a link between the concept as used in its fifth and sixth senses. For an attempt has been made to show that the principles of delimitatory law, though conceptually distinct from the rationale of continental-shelf entitlement, do, to a large degree, serve to further the policy aims which constitute this rationale. This is whence they derive much of their justification and their legal force. Indeed, as has already been observed, the tribunals themselves have made this link. So, in paragraph 43 of the *North Sea* cases, the International Court, in a passage which has already been quoted,<sup>353</sup> uses the term in its sixth sense as the basis of title, and then states:

from this it would follow that whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though the area may be closer to it than it is to the territory of any other coastal State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.

The 'most natural prolongation' idea is clearly referring to 'natural prolongation' as result: note the reference to a competing claim. The policy reasons behind the continental-shelf regime may suggest that a State receive a certain area of sea-bed; however, these policy reasons, applied in relation to another State, may suggest that it receive control over an area of sea-bed overlapping the first State's; the policy goals are then matched in relation to the two States, and each State receives the area where the goals are best served by such a solution. If the delimitatory principles do further the goals behind the shelf regime, then the interaction, weighing, and balancing of these principles, described above, depicts this process.<sup>354</sup>

This same linkage of the fifth and sixth senses of natural prolongation is made in the *Anglo-French* case. For the Court quotes paragraph 19 of the

<sup>353</sup> See p. 136 above at n. 22.

<sup>354</sup> Note also talk of one 'natural prolongation' not 'encroaching' on another at paras. 85(c) and 101 (C) (1), *ibid.* See p. 162 above.

*North Sea* cases, where 'natural prolongation' is used in the sense of the area over which the goals of the shelf regime suggest coastal State entitlement;<sup>355</sup> it then proceeds to cite paragraph 85(c), where 'natural prolongation' is used in the sense of the delimitatory result, stating it to be a 'conclusion' which flows from this 'fundamental rule'.<sup>356</sup> The Court confirms that it is referring to the fifth sense, since it says that 'natural prolongation states the problem rather than solves it'.<sup>356</sup>

The explanation of equitable principles given above seeks to play down interpretations of 'natural prolongation' construed in a strictly geological sense. Since the principles serve to define 'natural prolongation' as result, and consist almost entirely of principles related to coastal geography, this article shifts the emphasis of delimitatory law from geology to coastal geography. Thus Professor Bowett, writing after the *Anglo-French* case, believes that 'it is likely that in the future "natural prolongation" will be seen as referring to geographical configurations rather than geological factors'.<sup>357</sup> This should not be surprising. In the *North Sea* cases, the International Court treats the continental-shelf regime as just one more 'recent instance of encroachment on maritime expanses', and considers the law for the delimitation of the contiguous zone to be not really very different: 'In both instances the principle is applied that the land dominates the sea', and 'it is consequently necessary to examine closely the geographical configuration of the coastlines of the countries'.<sup>358</sup>

It might be objected that, if the nature of principles is as outlined in this article, then the principles are of little real use in that the equitable principles merely encapsulate policy goals, and an argument about them will ultimately become an unregulated dispute about policy, once the legal and normative clothing is removed. However, norms develop a life independent of the reasons behind them, which is why they are used to simplify decision-making, save time, reduce disputes and co-ordinate.<sup>359</sup> Though policy goals lie behind them, the principles tend to develop a standard weight of their own based upon these goals, and they are then argued about in their own right—although periodic assessments of the reasons behind them are possible to reassess their weight.<sup>360</sup> So, in the jurisprudence, the equitable principles are generally discussed without reference to policy;<sup>361</sup> although, as references in this article have shown, the policy goals behind them occasionally surface. Furthermore—and this is of great significance—the principles yielded by the jurisprudence are not norms solely because they reflect the rationale of the continental-shelf

<sup>355</sup> Para. 77.

<sup>357</sup> Loc. cit. above (p. 152 n. 129), at p. 16.

<sup>358</sup> Para. 96.

<sup>359</sup> Raz, *Practical Reason and Norms* (1975), pp. 59–61.

<sup>360</sup> Ibid., p. 72.

<sup>361</sup> And the tribunals discourage the parties from discussing the policy factors as an independent element in the delimitation issue: *Anglo-French* case, para. 188. See p. 171 n. 258 above.

<sup>356</sup> Para. 79.

regime. They are also delimitatory norms because they provide simple, certain and reasonably straightforward ways of delimiting a boundary. They therefore have weight not debatable in the terms which the criticism suggests. The description of equitable principles does not merely reduce pragmatic arguments into an intellectually satisfying pattern and conceal the 'un-normative' truth.



# THE MUNICIPAL ENFORCEMENT OF THE PROHIBITION AGAINST RACIAL DISCRIMINATION: A CASE STUDY ON NEW ZEALAND AND THE 1981 SPRINGBOK TOUR\*

By JEROME B. ELKIND<sup>1</sup> and ANTONY SHAW<sup>2</sup>

## I. INTRODUCTION

IN September 1980 the New Zealand Rugby Football Union invited the South African Rugby Board to send a 'merit-selected' national rugby team, 'the Springboks', to tour New Zealand in 1981. The South African team duly toured New Zealand in July, August and September 1981. The tour was marked by frequent demonstrations. These demonstrations were considered violent by New Zealand standards.

The tour caused bitter division within New Zealand society and opposition to it resulted in extended use of police power. Initially, the police took a low key, neutral approach aimed at protecting both demonstrators and spectators.<sup>3</sup> But when demonstrations resulted in the cancellation of two matches, the police were called upon to ensure that the remaining matches were actually played.<sup>4</sup>

This study describes some of the legal attempts which were made to stop the tour from proceeding.<sup>5</sup> Challenges to the tour were mounted before the New Zealand Human Rights Commission and in the courts. Both challenges involved New Zealand's international legal obligations.

One of the primary objects of this study is to examine the interpretation of these obligations from the standpoint of international law. Equally, it raises questions about the mode of implementation of such obligations in municipal law. The first part of the study will canvass arguments presented to the Human Rights Commission and the Commission's findings. It is primarily concerned with interpretation. The second part of the study, which deals with an attempt to enforce the obligations in the

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<sup>3</sup> *New Zealand Herald*, 26 March 1981, section 1, p. 9.

<sup>4</sup> Statement of the Acting Prime Minister of New Zealand, Mr D. MacIntyre, on 27 July 1981, reprinted in *New Zealand Foreign Affairs Review* (hereinafter *NZFAR*), 31 (1981), no. 3, p. 42. See also *New Zealand Herald*, 30 July 1981, section 1, p. 3.

<sup>5</sup> For other legal efforts, see *Clements v. Attorney-General*, High Court, Christchurch, 17 July 1981, M.307/81, Roper J, Butterworth's *Current Law*, 1981, para. 675; *Recent Law*, 1981, p. 286; see also *Auckland Star*, 28 August 1981, section 1, p. 1.

courts, will be concerned with implementation of international agreements in the domestic courts of New Zealand.

## II. THE NEW ZEALAND HUMAN RIGHTS COMMISSION

### (a) *Functions and Powers*

The New Zealand Human Rights Commission is established under the Human Rights Commission Act 1977.<sup>6</sup> Section 5 (1) (c) provides that one of the functions of the Commission is 'to receive and invite representations from members of the public on any matter affecting human rights'. Section 5 (1) (d) empowers the Commission:

To make public statements in relation to any matter affecting human rights, including statements promoting an understanding of, and compliance with, [the] Act.

Section 6 (1) (a) provides that the Commission shall have the function of reporting to the Prime Minister from time to time upon:

Any matter affecting human rights, including the desirability of legislative, administrative, and other action to give better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights.

Section 6 (1) (a) would seem to encompass not only treaties which create binding legal obligations for New Zealand but also such non-binding instruments as the Universal Declaration of Human Rights and other General Assembly resolutions. Recommendations of the Commission are not binding on the Government. Recommendations relating to standards laid down in non-binding instruments can only be phrased in terms of desirability of action to give them effect. On the other hand, where an international instrument is a treaty representing an obligation under international law, then a recommendation as to the desirability of action (including legislative action) can be made and reinforced by a statement that the obligations are binding upon New Zealand under international law.<sup>7</sup>

<sup>6</sup> New Zealand Statutes, 1977, No. 40.

<sup>7</sup> Human Rights Commission, *Report of Representations before the Human Rights Commission by the University of Auckland Law Students' Society (Inc)* (5 July 1979): see *New Zealand Law Journal*, 1979, pp. 365, 368-9. See also comment by Elkind, *American Journal of International Law*, 75 (1981), pp. 169-72. As to the significance of such a determination by the Commission, see *Exchange of Greek and Turkish Populations* advisory opinion (1925), *PCIJ*, Series B, No. 10, at p. 20; *Greco-Bulgarian 'Communities'* advisory opinion (1930), *PCIJ*, Series B, No. 17, at p. 32; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory* advisory opinion (1932), *PCIJ*, Series A/B, No. 44, at p. 24. See also Vienna Convention on the Law of Treaties (Vienna, 23 May 1969: hereinafter the Vienna Convention), Article 27, UN Document A/CONF. 39/27 (23 May 1969); reprinted in *American Journal of International Law*, 63 (1969), pp. 875, 884; *International Legal Materials*, 8 (1969), pp. 679, 690; entered into force 27 January 1980; New Zealand ratification deposited 4 August 1971.

The Commission's power to advise on the status of New Zealand's compliance with such instruments would seem to involve the correlative power to interpret such instruments. The further power to hear representations from members of the public<sup>8</sup> seems also to indicate that the Human Rights Commission is a forum in which legal argument can be heard and legal decisions, albeit advisory decisions, can be given. In short, the Human Rights Commission would seem to be a law-determining agency in respect of New Zealand's international legal obligations in the area of human rights.

It was with these considerations in mind that a group of prominent New Zealand citizens including Sir Edmund Hillary, Dr Martyn Finlay, the former Attorney-General of New Zealand, and the Dean of the University of Auckland Law Faculty, the late Professor J. F. Northey, requested the Commission to hear representations to the effect that allowing the Springbok tour to proceed would involve violations of New Zealand's legal obligations under two instruments: the Commonwealth Statement on Apartheid in Sport of 1977,<sup>9</sup> commonly known as the 'Gleneagles Agreement', and the International Convention on the Elimination of All Forms of Racial Discrimination<sup>10</sup> (hereinafter the Racial Discrimination Convention or the Convention).

### (b) *The Gleneagles Agreement*

The Gleneagles Agreement is a statement on *apartheid* in sport drawn up by Commonwealth Heads of Government at Gleneagles, Scotland, and issued as an attachment to the final communiqué of the Heads of Government meeting on 15 June 1977.<sup>11</sup>

A rugby tour of South Africa in 1976 by the New Zealand national team, known as 'the All Blacks', had resulted in a boycott of New Zealand competitors at the 1976 Olympic Games in Montreal, Canada. The Gleneagles Agreement was primarily an attempt to settle the differences between New Zealand and other Commonwealth States over the question of sporting contacts with the Republic of South Africa.

The Agreement affirms that *apartheid* in sport, as in other areas, is an abomination. In it, the Heads of Government of the Commonwealth reaffirmed that:

sporting contacts between their nationals and the nationals of countries practising

<sup>8</sup> Section 5 (1) (c). See text accompanying n. 6, above. See also Elkind, 'The Human Rights Commission as a law determining agency', *New Zealand Law Journal*, 1984, p. 198.

<sup>9</sup> Commonwealth Secretariat, *Commonwealth Heads of Government. The London Communiqué June 1977* (1977), pp. 21-2. See also *ibid.* at p. 6, para. 20; Foreign and Commonwealth Office, *A Yearbook of the Commonwealth*, 1978, pp. 53-4. See also *ibid.* at p. 43, para. 20.

<sup>10</sup> GA Res. 2106 (XX) Annex, *General Assembly Official Records*, 20th Session, Supplement 14 (A/6014), pp. 47-51 (21 December 1965), *United Nations Treaty Series*, vol. 660, p. 195; entered into force 7 January 1969; New Zealand ratification deposited 22 November 1972.

<sup>11</sup> For a list of States attending the meeting see *Keesing's Contemporary Archives*, p. 28503 (1977).

apartheid in sport tend to encourage the belief (however unwarranted) that they are prepared to condone this abhorrent policy.<sup>12</sup>

They also:

reaffirmed their full support for the international campaign against apartheid and welcomed the efforts of the United Nations to reach universally accepted approaches to the question of sporting contacts within the framework of that campaign.<sup>13</sup>

The Agreement contained a statement of regret as to past misunderstandings and attributed those misunderstandings to 'inadequate inter-governmental consultations'.<sup>14</sup> To resolve those misunderstandings, the Heads of Government accepted the following 'urgent duties':

vigorously to combat the evil of apartheid by withholding any form of support for, and by taking every practical step to discourage contact or competition by their nationals with sporting organisations, teams or sportsmen from South Africa or from any other country where sports are organised on the basis of race, colour or ethnic origin.<sup>15</sup>

The Heads of Government:

fully acknowledged that it was for each Government to determine in accordance with its laws the methods by which it might best discharge these commitments. But they recognised that the effective fulfilment of their commitments was essential to the harmonious development of Commonwealth sport hereafter.<sup>16</sup>

The Agreement talked of 'drawing a curtain across the past'<sup>17</sup> and concluded:

on that basis, and having regard to their commitments, they [the Heads of Government] looked forward with satisfaction to the holding of the Commonwealth Games in Edmonton [in 1978] and to the continued strengthening of Commonwealth sport generally.<sup>18</sup>

The issues concerning the Gleneagles Agreement were argued before the New Zealand Human Rights Commission. The first fundamental question involved the status of the Gleneagles Agreement. Is it a treaty creating rights and obligations of a legal nature? The New Zealand Government was not prepared to concede that it was. The second question involved the interpretation of the document itself and whether its terms, if binding, required the Government to stop the tour.

### 1. *Is the Gleneagles Agreement a treaty?*

The applicants had submitted that the Gleneagles Agreement was a treaty which obliged the New Zealand Government to ban the proposed tour. The position of the New Zealand Government (which chose not to

<sup>12</sup> Para. 2.

<sup>13</sup> Para. 3.

<sup>14</sup> Para. 2.

<sup>15</sup> Para. 4.

<sup>16</sup> Para. 5.

<sup>17</sup> Para. 6.

<sup>18</sup> Para. 7.

accept the Commission's invitation to submit observations)<sup>19</sup> appeared to be that the Gleneagles Agreement was not a treaty, although its own statements appear somewhat confused on this point. On 12 September 1980, during a debate in the New Zealand House of Representatives on the introduction of a Private Member's Bill which sought to incorporate the Gleneagles Agreement into New Zealand law,<sup>20</sup> the Minister of Foreign Affairs, Mr B. E. Talboys, remarked:

It is important to recognise that we are not talking about an international treaty or document that has been signed, but we are talking about a statement of an agreed point of view. The statement was not signed by anyone.<sup>21</sup>

But during the same speech he contended: 'It is not appropriate to attempt to write an international treaty into law'.<sup>22</sup>

The legal division of the Ministry of Foreign Affairs is reported as having advised in writing that:

The Commonwealth is a consensus organisation that arrives at its decisions by informal consultation rather than by compulsion or majority pressure. It is therefore inappropriate to incorporate Commonwealth decisions into formal treaties or agreements that might be enforced at international law. . . . Secondly, the substance of the Gleneagles Agreement is cast in such broad and general terms that it would not be appropriate to regard it as a legal document. The document was drafted by politicians rather than by lawyers, for the very reason that it is a political statement of intent rather than a contract or treaty. . . .

[Thirdly,] the agreement was never signed by any of the commonwealth countries, as it was never intended to be binding in law.<sup>23</sup>

But the Ministry also appeared to contradict itself when it advised that:

the approval of international agreements is the prerogative of the Executive under its treaty-making power. Constitutionally, it would be highly dubious to allow Parliament to approve or disapprove of such agreements.<sup>24</sup>

The Commission accepted that the Agreement is 'a policy statement of great significance',<sup>25</sup> but did not accept that it had the character of a treaty:

The so-called Gleneagles Agreement is not a formal written signed document, but technically part of a communique—although obviously a rather unique part. In form and expression it is clearly a political and not a legal statement.<sup>26</sup>

<sup>19</sup> Human Rights Commission, *Report and Recommendation to the Prime Minister on Representations Regarding the Proposed Springbok Rugby Tour of New Zealand* (25 June 1981), p. 3.

<sup>20</sup> Gleneagles Agreement Bill, No. 79-1. For debate see *New Zealand Parliamentary Debates* (hereinafter *NZPD*) (1980), vol. 433, pp. 3379-96, and *ibid.* (1981), vol. 438, pp. 1541-63.

<sup>21</sup> *Ibid.*, vol. 433, at p. 3381.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, vol. 438, at pp. 1541-2.

<sup>24</sup> *Ibid.*, at p. 1542. Of course, this argument was a *non sequitur* since the issue was not whether the Agreement should be 'approved' but whether it should be incorporated into New Zealand law, a matter which is indisputably within the province of the Parliament.

<sup>25</sup> *Loc. cit.* above (n. 19), at p. 6.

<sup>26</sup> *Ibid.* In support of its opinion, the Commission referred to (1) the wording of the Agreement; (2) the fact that none of the other governments involved had publicly contended that the New Zealand

To examine this conclusion, it is necessary to consider the Vienna Convention on the Law of Treaties<sup>27</sup> (hereinafter the Vienna Convention), to which New Zealand is a party. This Convention defines the term 'treaty' as:

an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>28</sup>

By virtue of Article 4, the Vienna Convention cannot, as such, be applied directly to the Gleneagles Agreement since the provisions of the former only apply *ex tunc*. None the less, the Vienna Convention has frequently been applied to antecedent legal instruments on the basis that it was intended to be a codification of customary international law relating to treaties.<sup>29</sup>

There seems to be little doubt that the Gleneagles Agreement was an agreement between States. Nor is there much doubt as to its written form, even though it is a communiqué or memorandum of agreement between Commonwealth Heads of Government. The International Law Commission's commentary on Article 2 (1) (a) accepts that any one of a number of terms may describe a treaty including the term 'agreement'.<sup>30</sup> A 'memorandum of agreement'<sup>31</sup> and a 'joint communiqué'<sup>32</sup> may also constitute a treaty if they are in written form.

Yet Article 2 (1) (a) provides only limited assistance with the task of determining whether a particular instrument is a treaty. Attempts to demonstrate that a particular instrument is a treaty are usually motivated by a desire to prove that it creates legal obligations. But one must first show that it is governed by international law before one can establish that it is a treaty. The words 'governed by international law' are an independent criterion in any case. The words were used because the ILC felt that

it ought to confine the notion of an 'international agreement' for the purposes of

Government had an obligation to them to ban the tour by declining entry permits; (3) a statement by the Prime Minister, Mr R. D. (now Sir Robert) Muldoon, within one month of the issue of the communiqué to the effect that it was understood that it was not the practice of the New Zealand Government to refuse visas to overseas sportsmen (see *NZFAR*, 27 (1977), no. 3, p. 13). Leaving aside the question whether these considerations are relevant to the status of the Agreement, it may be noted that some time after the report of the Commission had been presented, a number of statements made by Commonwealth leaders on the extent of the 'obligations' under the Gleneagles Agreement (and New Zealand's responses) were made public. For a list of these sources see below, p. 204 n. 89.

<sup>27</sup> See above, p. 190 n. 7.

<sup>28</sup> Article 2 (1) (a).

<sup>29</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 267 (1970)* advisory opinion (hereinafter the *Namibia case*), *ICJ Reports*, 1971, pp. 16, 47; *Golder v. United Kingdom* (1975), 57 ILR 200, 213-14, 1 EHRR 524, 532 (European Court of Human Rights); *Fothergill v. Monarch Airlines Ltd.*, [1981] AC 251, 282, [1980] 2 All ER 696, 707 (*per* Lord Diplock). See also Rosenne, *The Law of Treaties* (1970), p. 29.

<sup>30</sup> *Yearbook of the International Law Commission*, 1966, vol. 2, p. 188, para. 3.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Aegean Sea Continental Shelf case (Preliminary Objections)*, *ICJ Reports*, 1978, pp. 3, 39.

the law of treaties to one the whole formation and execution of which (as well as the *obligation* [ILC's emphasis] to execute) is governed by international law.<sup>33</sup>

In its judgment in the *Aegean Sea Continental Shelf* case,<sup>34</sup> it was stated by the International Court of Justice:

[I]n determining what was indeed the nature of the act or transaction embodied in [a joint communiqué], the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up.

Arguably, the preliminary object of such inquiry is to confirm or deny the existence of an intention to create legal relations.<sup>35</sup> Regarding this intent, one commentator, Professor James Fawcett, argues that intent cannot be presumed but must be clearly manifested.<sup>36</sup> If an instrument is called a 'treaty' or a 'convention', then we may feel safe in concluding that the intention is to create legal relations. An 'agreement' is another matter.<sup>37</sup> While a treaty may be called an 'agreement', the converse is not necessarily true. The term 'agreement' may be carefully chosen so as to avoid the impression that legal obligations are being created.

One conspicuous example of such an agreement is the Final Act of the Conference on Security and Co-operation in Europe adopted at Helsinki on 1 August 1975, commonly called the 'Helsinki Agreement'.<sup>38</sup> In that case, the 'High Representatives' of thirty-five States which signed the text declared in the concluding paragraph 'their determination to act in accordance with the provisions contained in the above texts'.<sup>39</sup> However, delegates during the Conference expressed an understanding that the Final Act did not involve a 'legal' commitment and was not intended to be binding upon the signatory powers.<sup>40</sup>

Professor Oscar Schachter has called such agreements 'nonbinding international agreements' and has described them as leading a sort of 'twilight existence'.<sup>41</sup> But, as he himself later suggested,<sup>42</sup> it is not strictly correct to call them 'nonbinding'. The expectation is that they create obligations. The Helsinki Agreement carries with it a strong expectation that it will be observed. It is considered to be at least morally, if not legally, binding.<sup>43</sup> In contrast to the Helsinki Agreement, neither the terms of the

<sup>33</sup> *Yearbook of the International Law Commission*, 1962, vol. 2, p. 32, para. 2.

<sup>34</sup> *ICJ Reports*, 1978, pp. 4, 39.

<sup>35</sup> Cf. *Yearbook of the International Law Commission*, 1966, vol. 2, p. 189, para. 6.

<sup>36</sup> Fawcett, 'The Legal Character of International Agreements', this *Year Book*, 30 (1953), pp. 381, 385.

<sup>37</sup> Caribbean Member States of the Commonwealth commonly refer to the Agreement as the Gleneagles 'Accord'. Cf. *The Times* (London), 27 February 1981, p. 1. The present authors' arguments apply *mutatis mutandis* to the term 'accord'.

<sup>38</sup> The text is reprinted in *International Legal Materials*, 14 (1975), p. 1292.

<sup>39</sup> *Ibid.*, at p. 1325.

<sup>40</sup> See Russell, 'The Helsinki Declaration: Brobdingnag or Lilliput', *American Journal of International Law*, 70 (1976), pp. 242, 247-8.

<sup>41</sup> Schachter, 'The Twilight Existence of Nonbinding International Agreements', *ibid.*, 71 (1977), p. 296.

<sup>42</sup> *Ibid.*, at p. 300.

<sup>43</sup> Russell, *loc. cit.* above (n. 40), at p. 246.

Gleneagles Agreement nor the circumstances of its conclusion contain clear-cut evidence of a lack of intent to enter into legal relations. That being so, it is necessary to determine whether affirmative evidence of intent exists. Certain of the language in the Agreement appears to cast doubt on the parties' intent to enter into legal obligations. For example, paragraph 5 states that the parties 'fully acknowledged that it was for each Government to determine in accordance with its own laws the methods by which it might best discharge these commitments'. Fawcett believes that such provisions appear to negative any intention to create legal obligations because they leave it to the parties themselves to determine both the extent of the obligations which they have assumed and the mode of performance: an undertaking qualified by the words 'subject to the law in force' would, it is submitted, create no legal obligation at all, for it would enable any party to appeal successfully to municipal law against any attempt by another party to enforce the obligation.<sup>44</sup>

However, allowing a State to determine in accordance with its own law *how best* to fulfil an obligation cannot be construed as releasing it from the obligation. It relates only to the means which a State may choose to render compliance. In the next section of this study, it will be shown that this language still creates a measure of obligation for the parties. Moreover, a State may not appeal to its municipal law as a defence to a charge of non-fulfilment of an obligation,<sup>45</sup> particularly when that municipal law permits the obligation to be fulfilled.

Another provision which might be said to give rise to some difficulty is paragraph 4, which obliges the parties to take 'every practicable step' to fulfil their obligations. Fawcett also questioned the legal nature of this type of undertaking. Obligations 'to use best endeavours' or 'to take all possible measures', he said, 'can in most cases amount to [no] more than declarations of policy, or of goodwill towards the objects of the agreement'.<sup>46</sup>

Such provisions may be called 'soft law'. In a recent article, Professor Prosper Weil said of them:

Whether a rule is 'hard' or 'soft' does not, of course, affect its normative character. A rule of treaty or customary law may be vague, 'soft'; but . . . it does not thereby cease to be a legal norm.<sup>47</sup>

The question whether a State has 'used its best endeavours' or has taken 'all possible measures' or 'every practical step' is capable of objective

<sup>44</sup> Loc. cit. above (p. 195 n. 36), at pp. 390-1. But see the views of the majority judges in *Commonwealth of Australia v. State of Tasmania* (1983), 57 ALJR 450 (High Court of Australia).

<sup>45</sup> Vienna Convention, Article 27.

<sup>46</sup> Loc. cit. above (p. 195 n. 36), at p. 391. Cf. Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. 34/180 Annex, *General Assembly Official Records*, 34th Session, Supplement 46 (A/34/46), pp. 193-8 (18 December 1979), Articles 2, 3, 5, 6, 7, 8, 10, 11 (1), 12 (1), 13, 14 (2), 16 (1); entered into force 3 September 1981.

<sup>47</sup> Weil, 'Towards Relative Normativity in International Law?', *American Journal of International Law*, 77 (1983), pp. 413, 414.

determination.<sup>48</sup> If a State is demonstrably tepid in its approach to its commitments, or if it is marching in a volte-face in the opposite direction, surely it is not fulfilling its obligations.

An attempt was made before the Commission to demonstrate that the Agreement creates legal obligations by referring to its use of terms like 'duty'<sup>49</sup> and 'commitments'.<sup>50</sup> Reference was also made to the 'Jackman affair' where Guyana, citing the Gleneagles Agreement, had revoked an English cricket player's permission to stay in Guyana on the basis of his regular participation in South African sport,<sup>51</sup> and a signed statement issued on 4 March 1981 by the Governments of Antigua, Barbados, Jamaica and Montserrat on the nature and effect of the Agreement.<sup>52</sup> The former Chief Human Rights Commissioner, Mr P. J. Downey, quite rightly observed that none of these considerations was conclusive on the question of intention to create legal relations. He indicated that the context in which the terms 'duty' and 'commitments' occurred suggested that the duties and commitments antedated the Agreement. Nevertheless, a treaty is no less a treaty merely because it codifies pre-existing commitments. The Vienna Convention itself serves to codify pre-existing duties and commitments where, in fact, it codifies norms of customary international law.

Schachter notes that a non-binding agreement does not engage the legal responsibility of the parties:

What this means simply is that noncompliance by a party would not be a ground for a claim for reparation or for judicial remedies. . . . [I]t is possible and reasonable to conclude that states may regard a nonbinding undertaking as controlling even though they reject legal responsibility and sanctions.<sup>53</sup>

But this does not help with the problem of determining whether there is an objective test of intent to enter into legal relations. In the final analysis, the fact that an agreement does not contemplate arbitral or judicial settlement is of no assistance. The jurisdiction of international judicial and arbitral tribunals is based on consent. Few treaties contemplate this form of settlement and the fact that a treaty does not contemplate judicial settlement cannot be regarded as evidence of a lack of intent to enter into legal relations. Likewise, there are many treaties in which the appropriate

<sup>48</sup> Arguably such qualifications are redundant. It would seem to be an implied term of every agreement that the steps which a State takes to fulfil its obligations be practicable. One would hardly expect a State to take steps which are not practicable. Nor can a State use more than its 'best endeavours'.

<sup>49</sup> Para. 4.

<sup>50</sup> Paras. 5 and 7.

<sup>51</sup> *The Times* (London), 27 February 1981, p. 1.

<sup>52</sup> *Ibid.*, 5 March 1981, pp. 1 and 21. It reads, in part: '... it is the *obligation* of the governments concerned to *discourage* [emphases added] such contacts [with *apartheid* sport] by their nationals': *ibid.* at p. 21.

<sup>53</sup> *Loc. cit.* above (p. 195 n. 41), at p. 300.

remedy for breach is not reparation.<sup>54</sup> Reparation is *only one* of a number of remedies which can be sought for breach of a treaty. If it does reach a judicial tribunal, the remedy sought may be specific performance or a mere declaration that the treaty has been breached. Alternatively, breach may be a ground for suspension or repudiation of the treaty by the other party or parties.<sup>55</sup> The status of a treaty is not necessarily open to question merely because the sanctions for non-compliance are weak ones.

Perhaps a useful way of discovering intent to enter into legal relations would be to examine the contractual nature of the obligations created. Treaties are pacts to which the rule *pacta sunt servanda* applies.<sup>56</sup> If they are not pacts, they are not binding and vice versa. So what may be said is that there is an intent to enter into legal relations if there is contractual intent.

When we consider the Gleneagles Agreement, we can see that it was concluded in order to avoid a specific sanction—a repetition in future Commonwealth sporting activities of the boycott of New Zealand athletes that had occurred at the Montreal Olympics.<sup>57</sup> This boycott had been ordered by the various African and Caribbean Governments. The promises that were exchanged included a cessation of the threat of boycotts, the restoration of harmonious relations and a promise to discourage sporting ties with South Africa. Of course, such promises must be intended to be legally binding. 'That always remains a separate and independent question. . . .'<sup>58</sup>

To have been able to categorize the Gleneagles Agreement as a treaty would have been useful in arguments before the New Zealand Human Rights Commission. It would be essential if one were to attempt to invoke it before an international tribunal such as the International Court of Justice. However, the Agreement does not contemplate arbitral or judicial settlement.<sup>59</sup> But, says Weil,

The acts accomplished by subjects of international law are so diverse in character that it is no simple matter for a jurist to determine what may be called the normativity threshold: i.e., the line of transition between the nonlegal and the legal, between what does not constitute a norm and what does.<sup>60</sup>

<sup>54</sup> See, e.g., Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Moscow, 5 August 1963): *United Nations Treaty Series*, vol. 480, p. 43; *United States Treaties*, 14 (1963), pt. 2, p. 1313; *Treaties and Other International Acts Series*, No. 5433.

<sup>55</sup> Vienna Convention, Article 60.

<sup>56</sup> *Ibid.*, Article 26.

<sup>57</sup> In a letter addressed to the Chairman of the New Zealand Rugby Football Union on 26 September 1980, the Minister of Foreign Affairs, Mr B. E. Talboys, stressed that '[t]he Agreement was a direct consequence of the All Blacks' tour of South Africa in 1976': *NZFR*, 30 (1980), no. 3, p. 33.

<sup>58</sup> Stone, *The Province and Function of Law* (1946), p. 541.

<sup>59</sup> None the less, if it were a treaty, it might be possible to invoke it under Article 36 (2) (d) of the Statute of the Court. *Sed quaere*: since the Gleneagles Agreement is not registered with the Secretariat of the United Nations, can it be invoked before the International Court of Justice?

<sup>60</sup> *Loc. cit.* above (p. 196 n. 47), at p. 415.

Whatever term may be applied to the Gleneagles Agreement, this much can be said of it:

1. The parties made a bargain.
2. That bargain involved an exchange of promises.
3. Each party regards that bargain as binding both on itself and on the other parties.
4. Many of the parties have taken measures which they regard as essential to the fulfilment of their obligations.
5. Sanctions were envisaged for non-compliance and sanctions have been applied.<sup>61</sup>
6. The parties are in dispute over the interpretation of its provisions.

Even though the parties appear distinctly hesitant about characterizing the Gleneagles Agreement as a treaty and its obligations as legal obligations, it looks uncommonly like a treaty or at least the Commonwealth equivalent of one.<sup>62</sup> As Weil points out,

this problem of the transition from nonlaw to law occurs in all legal systems, in particular under the guise of the distinction between moral and legal obligation. But the multiplicity of the forms of action secreted by the needs of international intercourse has rendered it more acute in that field than in any other, since in the international order neither prenormative nor normative acts are as clearly differentiated in their effects as in municipal systems. While prenormative acts do not create rights or obligations on which reliance may be placed before an international court of justice or of arbitration, and failure to live up to them does not give rise to international responsibility, they do create expectations and exert on the conduct of states an influence that in certain cases may be greater than that of rules of treaty or customary law. Conversely, the sanction visited upon the breach of a legal obligation is sometimes less real than that imposed for failure to honor a purely moral or political obligation.<sup>63</sup>

## 2. *Interpretation of the Gleneagles Agreement*

Two conflicting interpretations of the Gleneagles Agreement stem from

<sup>61</sup> On 15 and 16 June 1981 the Acting Prime Minister of Antigua, Mr L. B. Bird, and the Prime Minister of Jamaica, Mr E. P. Seaga, respectively announced that, should the Springbok tour proceed, the cricket tour of the West Indies by New Zealand scheduled for 1982 would be threatened: *NZFFAR*, 31 (1981), no. 2, pp. 52-3. Subsequently this tour was cancelled. On 21 July 1981 the venue of the Commonwealth Finance Ministers' Meeting scheduled to be held in Auckland was moved to Nassau in the Bahamas: *ibid.*, no. 3, pp. 37-8.

<sup>62</sup> From the standpoint of international law, it may be unnecessary to claim that the Gleneagles Agreement is a treaty in order to establish that it creates legal consequences: see *Nuclear Tests cases (Second Phase), Australia v. France, ICJ Reports*, 1974, pp. 253, 267; *New Zealand v. France, ibid.*, pp. 457, 472, in which the International Court of Justice held that a unilateral statement by France that she would test underground was sufficient to create a binding legal obligation on France to refrain from atmospheric nuclear testing. The Court recognized that declarations made by way of unilateral acts may have the effect of creating legal obligations. Cf. Elkind, 'Footnote to the Nuclear Test Cases: Abuse of Right—A Blind Alley for Environmentalists', *Vanderbilt Journal of Transnational Law*, 9 (1976), pp. 57-64. See also Rubin, 'The International Legal Effects of Unilateral Declarations', *American Journal of International Law*, 71 (1977), p. 1.

<sup>63</sup> *Loc. cit.* above (p. 196 n. 47), at p. 415.

different emphases placed on the words of the fourth paragraph.<sup>64</sup> The position of the New Zealand Government focused upon the word 'discourage'. On the strength of this word, it claimed that its duty was fulfilled by its attempts to dissuade New Zealand sportspersons from engaging in sporting contacts with South African *apartheid* sport. It pointed to a number of communications with the New Zealand Rugby Football Union calling the attention of its members to the Gleneagles Agreement and asking the Union to reconsider its decision to invite the South African team to tour New Zealand<sup>65</sup> and to a Notice of Motion endorsed by the New Zealand House of Representatives on 19 June 1981 urging the Union to 'reconsider' its invitation.<sup>66</sup>

It also relied on paragraph 5 of the Agreement which provided that it was for each government to determine the methods by which it might discharge its commitments in accordance with its own laws.<sup>67</sup> It took the position that the Gleneagles Agreement left a discretion to the parties as to the modalities of its implementation<sup>68</sup> and that banning the tour would be inconsistent with New Zealand's laws and administrative practices.<sup>69</sup> Thus it insisted that the Agreement permitted it to pursue a policy of 'no political interference in sport in any form'<sup>70</sup> which meant that, while it would undertake to dissuade sporting bodies from contact with South Africa, 'decisions on sporting matters will be left to the sportsmen themselves'.<sup>71</sup>

The contrary view, held by other Commonwealth Governments, the Commonwealth Secretary-General and many New Zealanders, emphasized the words 'vigorously' and 'every practical step' in paragraph 4. On this interpretation, attempts to dissuade the rugby officials from holding

<sup>64</sup> See text accompanying n. 15 at p. 192, above.

<sup>65</sup> Typical of this is a letter from the Minister of Foreign Affairs, Mr B. E. Talboys, to the Chairman of the New Zealand Rugby Football Union, Mr C. A. Blazey, dated 26 September 1980: see *NZ FAR*, 30 (1980), no. 3, pp. 33-4. Other communications were sent on 17 April 1980, 5 December 1980 and 27 May 1981.

<sup>66</sup> For text and debate see *NZPD* (1981), vol. 437, pp. 602-28. For other action taken see below, n. 130 p. 212, and accompanying text.

<sup>67</sup> See text accompanying n. 16 at p. 192, above.

<sup>68</sup> 'The Ministry of Foreign Affairs drew attention particularly to one sentence in the agreement: "They"—that is, the heads of government—"fully acknowledge that it was for each Government to determine in accordance with its laws the methods by which it might best discharge these commitments." The ministry's legal section believed that that sentence merely requires the Government to give effect to the Gleneagles Agreement "by whatever methods seemed to the Government most appropriate in the light of existing laws." In other words, the Gleneagles document leaves it to the Government to exercise a discretion as to how the apartheid policy should be meshed with our existing laws . . .': see *NZPD* (1981), vol. 438, p. 1542. In its statements on the extent of its discretion, the Government often seemed to blur the distinction between 'laws' on the one hand and 'policy' and 'practices' on the other.

<sup>69</sup> In the debate on the Declaration Against *Apartheid* in Sports, the New Zealand representative, Mr M. J. C. Templeton, told the General Assembly: 'If the Declaration . . . causes New Zealand difficulties, it is only because in certain of its provisions the proposed Declaration seeks to achieve its fundamental aims in ways which do not accord with our laws and administrative practices or take account of the limited authority of our Government to intervene in the private affairs of its citizens, among which sporting activities are included': UN Doc. A/32/PV. 102, para. 73 (14 December 1977).

<sup>70</sup> Statement on *Apartheid* in Sport issued by the Prime Minister of New Zealand, Mr R. D. Muldoon, on 14 July 1977; printed in *NZ FAR*, 27 (1977), no. 3, p. 13; UN Doc. A/AC. 115/L. 469.

<sup>71</sup> *Ibid.*

the tour, with nothing more, did not constitute *every* practical step. Something more tangible like the withholding of entry permits from the South African rugby players and officials was required.

The applicants submitted to the Commission that the Government's powers under the Immigration Act 1964<sup>72</sup> were perfectly adequate to allow it to prevent the tour by withholding entry permits. Section 14 of that Act provides, in part:

- (1) Any person . . . not being a prohibited immigrant, who lands<sup>73</sup> in New Zealand without a permit but proves to the satisfaction of the Minister that he desires to enter New Zealand as a visitor only for purposes of business, employment, study, training, instruction, pleasure, or health may be granted a temporary permit. . . .
- (2) Any such temporary permit may be granted subject to such conditions (if any) as may be prescribed by regulations under this Act, and to such other conditions as may in any case be imposed by the Minister. Every person to whom a temporary permit is so granted who fails to comply with any of the conditions subject to which that permit has been granted commits an offence against this Act.  
...
- (6) A temporary permit granted under this section may be at any time revoked by the Minister. Every person whose temporary permit has been so revoked commits an offence against this Act if he does not leave New Zealand. . . .

Thus the Minister of Immigration has broad discretion as to:

- (a) whether to grant permits,
- (b) the conditions which he or she is permitted to prescribe in permits, and
- (c) whether to revoke permits.

The applicants submitted that it would, therefore, have been entirely possible, under New Zealand law, for the Minister either to refuse to grant permits to South African sportspersons or to grant them subject to a condition which would have prohibited them from participating in the tour. New Zealand had, under a previous government, withheld permits from a South African Federation Cup tennis team in 1973.<sup>74</sup>

Preventing New Zealand citizens from going overseas would have been a different matter. It was genuinely open to the New Zealand Government to argue that it was contrary to New Zealand laws and administrative practices to prevent its citizens from going to play rugby in South Africa.<sup>75</sup>

<sup>72</sup> New Zealand Statutes, 1964, No. 43; *Reprinted Statutes of New Zealand*, vol. 6, p. 591.

<sup>73</sup> New Zealand administrative practice relating to temporary permits is to stamp the permit in the visitor's passport *after* he or she has landed even though the visitor may have applied for a permit and a decision has been made to grant it prior to actual entry into the country.

<sup>74</sup> United Nations Centre Against *Apartheid*, Notes and Documents, No. 8/80, 'Racial Discrimination in South African Sport' by Sam Ramsamy, Chairman, South African Non-Racial Olympic Committee (April 1980), p. 53.

<sup>75</sup> *Loc. cit.* above, p. 193 n. 19, at p. 11. See also *Parsons v. Burk*, [1971] NZLR 244, in which a *private individual* failed in his bid to invoke the ancient writ *ne exeat regno* to prevent the New Zealand All Black rugby team from leaving the realm in order to tour South Africa.

It is entirely possible that the word 'discourage' was chosen instead of words like 'prohibit' or 'prevent' so as not to imply an obligation on the part of a State to ban travel by its own citizens.

Another argument rested on the qualifying words in paragraph 5 that the Heads of Government

recognized that the effective fulfilment of their commitments was essential to the harmonious development of Commonwealth sport hereafter.

On this argument, the obligation under the Agreement was not merely to 'discourage' contacts, but to discourage them 'effectively'. And this duty must be regarded as 'essential'. The duty to discourage 'effectively' can thus be understood as a duty to discourage its own sportspersons from travelling to South Africa as forcefully as possible and a duty to withhold permits from South African sportspersons attempting to enter New Zealand. Curiously, the Human Rights Commission ignored this argument. It was, however, adverted to by the Commonwealth Secretary-General, Mr (now Sir) Shridath Ramphal.<sup>76</sup>

The Human Rights Commission considered that the wording of the Gleneagles Agreement was carefully chosen. 'The term "discourage"', it said, 'does not mean prohibit or prevent'. Furthermore, the Commission concluded that the phrase 'every practical step' and the phrase to the effect that it was for each government to determine 'the methods by which it might best discharge these commitments' were 'qualifying phrases'.<sup>77</sup> The Commission noted that none of the other governments involved had publicly contended that the New Zealand Government had an obligation to ban the tour by declining to issue permits.<sup>78</sup> Nor, it observed, did the Commonwealth Secretary-General specifically say that the New Zealand Government was legally bound to do so.<sup>79</sup> The Commission also noted that the Prime Minister had issued a statement in which he said that it was known to the Heads of Government of the Commonwealth countries that it was not the practice of the New Zealand Government 'to refuse visas to overseas sportsmen'.<sup>80</sup> The Commission attached considerable importance to the fact that this understanding, voiced by the Prime Minister soon after the Agreement, was apparently never disputed or questioned by any other Commonwealth Head of Government.<sup>81</sup>

Even though the Gleneagles Agreement could not, in the opinion of the Commission, be read as imposing a binding obligation on the New Zealand Government to ban the tour, it did not follow that the New Zealand Government should not do so:

<sup>76</sup> See text accompanying n. 87 p. 204, below.

<sup>77</sup> Loc. cit. above, p. 193 n. 19, at p. 6.

<sup>78</sup> This observation is not accurate. See above, p. 193 n. 26.

<sup>79</sup> Loc. cit. above, p. 193 n. 19, at pp. 6-7. For discussion of the Secretary-General's views see below, pp. 203-4 nn. 85-9 and accompanying text.

<sup>80</sup> Loc. cit. above, p. 193 n. 19, at p. 7. See above, nn. 70 and 71 at p. 200 and accompanying text.

<sup>81</sup> Cf. the Vienna Convention, Article 31 (3) (b).

There is nothing in the [Gleneagles Agreement] to stop the New Zealand Government from declining to grant entry permits to the proposed Springbok team. The statement uses extremely strong language about racial discrimination and *apartheid* in the context of concern about sporting competition, such as 'a dangerous sickness', 'an unmitigated evil', 'an abomination', 'the abhorrent policy' and the 'detestable policy of *apartheid*'.

This is the language to which New Zealand is committed, and if it has real meaning it calls for the strongest action that the Government can properly take. The Government of New Zealand has the right as well as the power not to allow entry to New Zealand of those people whose presence here, for whatever reason is undesirable. There is no obligation on the Government to allow people to enter New Zealand whether for business or pleasure, for sport or tourism. Admission of anyone to this country is and always has been at the discretion of the Government.<sup>82</sup>

It concluded that '[t]o stop the tour, whether by refusing entry permits or otherwise, would be consistent with the general purpose and declared sentiment of the Gleneagles Agreement'.<sup>83</sup>

On the assumption that the Gleneagles Agreement is a treaty, the Vienna Convention will be helpful in interpreting it. Under Article 31 (1):

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The object and purpose of the Agreement is to effectuate a sporting boycott of South Africa<sup>84</sup> and a teleological interpretation would be one aimed at achieving this purpose.

In this regard, on 21 July 1981 the Commonwealth Secretary-General, Mr Shridath Ramphal, issued a statement explaining the decision to move the Commonwealth Finance Ministers' meeting from Auckland.<sup>85</sup> He said that the decision to move the meeting was necessary to uphold the 'commitment to the objectives of the Gleneagles Agreement and the international campaign against apartheid'.<sup>86</sup> This view was elaborated as follows:

The Springbok tour of New Zealand represents the most significant sporting contact between any Commonwealth country and South Africa since the Gleneagles Agreement was concluded in 1977. The Commonwealth has confirmed that it is an unacceptable departure from the goals of Gleneagles. What Gleneagles called for was vigorous discouragement of such sporting contacts

<sup>82</sup> Loc. cit. above, p. 193 n. 19, at p. 7.

<sup>83</sup> Ibid. An identical point of view was expressed by the Prime Minister of Zimbabwe, Mr R. G. Mugabe, in a letter to the Prime Minister of New Zealand on 18 June 1981: see *NZ FAR*, 31 (1981), no. 2, p. 54.

<sup>84</sup> In the words of the New Zealand representative, Mr M. J. C. Templeton, addressing the General Assembly in 1977, '[t]he fundamental aim of [the Gleneagles Agreement] was . . . to advance the fight against *apartheid* by eliminating that evil from the world of sport': UN Doc. A/32/PV. 102, para. 72 (14 December 1977); reprinted in *NZ FAR*, 27 (1977), no. 4, p. 69.

<sup>85</sup> See above, n. 61 at p. 199 and accompanying text.

<sup>86</sup> *NZ FAR*, 31 (1981), no. 3, p. 38.

through all practicable means. Governments who chose [*sic*] as a matter of policy not to exercise the right of withholding visas to South African sporting teams (as distinct from preventing their own sportsmen from travelling) do not thereby absolve themselves of Gleneagles obligations—they make it even more necessary to find other means of discharging their obligations. Otherwise it would be simple enough for any government to recite itself out of the agreement's commitments. This was not and is not the intent of Gleneagles.

It was because all this was fully understood that Commonwealth leaders 'specially welcomed the belief unanimously expressed at their meeting, that in the light of their consultations and accord there were unlikely to be sporting contacts of any significance between Commonwealth countries and their nationals and South Africa'. The Prime Minister of New Zealand gave this expectation more specific content when at his press conference after Gleneagles he said, 'I'm well convinced that there will be no rugby test between New Zealand and South Africa while South Africa is selecting its rugby teams on other than a fully integrated basis'.<sup>87</sup> There were no exceptions or reservations at Gleneagles which diminish the obligations of governments.<sup>88</sup>

Furthermore, in an article in *The Times* (London), Mr Ramphal said:

No one argues . . . that the Government of New Zealand is obliged by the agreement to use its immigration powers to prohibit sporting contacts. It could use those powers, it has invoked them to discourage other 'cultural exchanges'. There is no impediment in law. . . .

It has chosen as a matter of policy not to withhold visas—as it always said it would not. But that does not dispose of the Government's obligations under Gleneagles. The very act of self-abnegation raises a duty to fulfil them through other means. Gleneagles left it to each government to find and employ its own means of discouragement: and it held out the assurance of success.<sup>89</sup>

The New Zealand reply emphasized, in the first instance, the circumstances in which paragraph 5 was inserted into the Agreement and its intent. In a letter addressed to the President of Tanzania, Dr J. K. Nyerere, on 16 June 1981, the Prime Minister of New Zealand wrote:

You will recall that at that time I made it clear in the drafting meeting that if the Gleneagles Agreement made it mandatory for the New Zealand Government to withhold visas or passports, we could not be a party to it. Accordingly a paragraph was drafted into the agreement which refers to the laws of each country in terms of the method by which they will carry out their obligations. Both in that meeting and on my return to New Zealand I made it clear that whereas the Government would carry out its obligations under the agreement, these obligations did not

<sup>87</sup> For other statements to similar effect, see *The Times* (London), 15 June 1977, p. 6; *NZPD* (1981), vol. 438, p. 1068; *New Zealand Herald*, 15 July 1977, section 1, p. 1.

<sup>88</sup> *NZFAR*, 31 (1981), no. 3, p. 37.

<sup>89</sup> *The Times* (London), 5 August 1981, p. 10; reprinted in *NZFAR*, 31 (1981), no. 3, at pp. 44–5. See also *ibid.*, no. 2, p. 61. For other relevant statements, see *ibid.* 30 (1980), no. 4, pp. 37–40; *ibid.* 31 (1981), no. 1, pp. 23–4; *ibid.*, no. 2, pp. 46–62; *ibid.*, no. 3, pp. 31–48 and 65; *ibid.*, no. 4, pp. 53–4; *The Sunday Times* (London), 21 June 1981, p. 9; *New Zealand Herald*, 1 July 1981, section 1, p. 3; and Commonwealth Secretariat, *Report of the Commonwealth Secretary-General 1981* (1981), pp. 31–48.

extend to the withdrawal of visas or passports and related solely to sporting purposes.<sup>90</sup>

Secondly, New Zealand drew attention to statements made by the Prime Minister of Australia, Mr J. M. Fraser, during a television interview in July 1977. In that interview Mr Fraser said that the Gleneagles Agreement did not prohibit a country from issuing visas to individual sportsmen from South Africa. He noted that the Agreement used the word 'discourage' and not 'prohibit':

[M]any African and Caribbean countries were earlier tending to demand the word 'prohibit'. The communique or document ended up with the word 'discourage'. It was really around that, the agreement was reached.<sup>91</sup>

Thirdly, New Zealand cited a statement made in the House of Commons on 24 June 1981 by the Under-Secretary of State for Foreign and Commonwealth Affairs, Mr R. Luce, describing the position of the United Kingdom:

Whether with regard to the Olympics or under the Gleneagles agreement on South Africa, we have sought to use whatever means we can to persuade sportsmen not to participate. However, we are a democracy and we believe in individual liberty. Consequently, we believe it is wrong to use Government powers to prevent sportsmen from exercising their rights.<sup>92</sup>

There is much force in the first two of these counter-arguments, especially the point that paragraph 5 was expressly added to the original draft to take account of the New Zealand Government's policy on the rights of sportspersons and that there would have been no Agreement but for the insertion of paragraph 5. Thus it can be accepted that it was not necessarily a breach of the Gleneagles Agreement for New Zealand to issue entry permits to members and officials of the Springbok team. However, that is not the end of the matter. Under the Gleneagles Agreement, the parties assumed an obligation to discourage effectively sporting contacts with South Africa by every practical step short of withholding entry permits or visas. Did the New Zealand Government continue to discharge this obligation after the Springboks had arrived in New Zealand?

As a result of unprecedented action on the part of demonstrators (including an invasion of the playing area), the Springbok team's match in Hamilton on 25 July 1981 could not commence and was abandoned. Two days later, the New Zealand Cabinet met to decide the fate of the tour.

<sup>90</sup> *NZFA*R, 31 (1981), no. 2, p. 51. See also *ibid.*, pp. 49, 52-5 and 60-1; *ibid.* 27 (1977), no. 3, p. 13; *ibid.* 30 (1980), no. 4, p. 38; *ibid.* 31 (1981), no. 3, pp. 31, 36 and 43-4; *NZPD* (1981), vol. 438, p. 1068.

<sup>91</sup> *NZFA*R, 31 (1981), no. 3, p. 60. See also *Auckland Star*, 5 July 1977, section 1, p. 3. *Per contra*, see *NZPD* (1981), vol. 438, p. 1120, and *New Zealand Herald*, 4 July 1981, section 1, p. 3.

<sup>92</sup> *Hansard*, H.C. Debs., Sixth Series, vol. 7, col. 237 (24 June 1981), reprinted in *NZFA*R, 31 (1981), no. 3, at p. 55.

Later that day, in a press statement, the Acting Prime Minister, Mr D. MacIntyre, announced:

Cabinet has very carefully considered the situation arising from the cancellation of the rugby match at Hamilton last Saturday. Particularly we have received reports from the Commissioner of Police and have consulted the Crown's senior legal advisers.

By their conduct the protestors have changed the issue from one of opposition to apartheid to a threat to the institutions of a democratic society.

Put in that way, there can be only one answer. The rule of law must prevail. The Police are the only proper agency to maintain law and order in such situations and, if necessary, they must be given additional resources to deal with the circumstances as they see fit. The Government has decided that they will have those additional resources. . . .

Particularly the facilities of the armed forces will be made available—not to undertake 'front line' policing activities, but to provide transport and other logistic support that might be required.<sup>93</sup>

The position of the New Zealand Government, when put in terms of upholding the rule of law, has a superficial appeal. At the same time, however, it cannot be denied that the cancellation of the match at Hamilton presented the Government with a clear opportunity to decide afresh whether the tour should be allowed to continue. Presented with this opportunity, the Government chose to guarantee the continuation of the tour through the deployment of police and military resources. This affirmative and deliberate decision was arguably a breach of the obligation under the Gleneagles Agreement to 'vigorously combat the evil of apartheid by *withholding any form of support*' (emphasis added) for sporting contacts with South Africa.<sup>94</sup>

Furthermore, when a government professes devotion to the rule of law, this professed devotion is only credible when the Government is seen to abide by its own legal obligations. Even if the Gleneagles Agreement is not a treaty and hence does not create legal obligations, the New Zealand Government does have legal obligations which have a bearing on its duty to prevent the tour. These will be examined in the following sections of this study.

### (c) *The International Convention on the Elimination of All Forms of Racial Discrimination*

#### 1. *Background considerations*

(i) *The United Nations Charter.* The relevant provisions of the United Nations Charter are the Preamble, and Articles 1 (3), 13 (1), 55, 56, 62 (2) and 76. These provisions emphasize the fundamental role of the United

<sup>93</sup> See *NZFA*, 31 (1981), no. 3, at p. 42.

<sup>94</sup> Para. 4. Cf. below, nn. 128–35 at pp. 212–13 and accompanying text.

Nations in protecting human rights and in combating racial discrimination. These functions are discharged both by the General Assembly and by the Economic and Social Council subject to the control of the General Assembly.

The Special Committee Against *Apartheid* was established by the General Assembly in 1962<sup>95</sup> as the Special Committee on the Policies of *Apartheid* of the Government of the Republic of South Africa. Its mandate was '[t]o keep the racial policies of the Government of South Africa under review when the Assembly is not in session' and '[t]o report either to the Assembly or to the Security Council or to both, as may be appropriate, from time to time'. In 1970 the General Assembly expanded the membership of the Special Committee and shortened its title to the present one.<sup>96</sup> In 1965 the General Assembly established the United Nations Trust Fund for South Africa to help the victims of *apartheid*<sup>97</sup> and the Unit on *Apartheid* which is now known as the Centre Against *Apartheid*.

Charter obligations are expressed in general terms. The Charter condemns racial discrimination. It does not specifically mention *apartheid*. There is, however, a decisive current of opinion to the effect that *apartheid* is a violation of the Charter. Not only is *apartheid* itself a violation, but so is any act that can be construed as aiding and abetting it.

United Nations resolutions and declarations have repeatedly and consistently maintained since 1952 that the policy of *apartheid* is a breach of the Charter.<sup>98</sup>

<sup>95</sup> GA Res. 1761 (XVII) (6 November 1962). The Reports of the Committee from 1971 are as follows: *General Assembly Official Records*, 26th Session, Supplement 22 (A/8422/Rev.1); *ibid.*, 27th Session, Supplements 22, 22A and 22B (A/8722 and Add. 1 and 2); *ibid.*, 28th Session, Supplement 22 (A/9022); *ibid.*, 29th Session, Supplements 22 and 22A (A/9622 and Add. 1); *ibid.*, 30th Session, Supplement 22 (A/10022); *ibid.*, 31st Session, Supplement 22 (A/31/22 and Add. 1-3); *ibid.*, 32nd Session, Supplements 22 and 22A (A/32/22 and Add. 1-3); *ibid.*, 33rd Session, Supplements 22 and 22A (A/33/22 and Add. 1 and 2); *ibid.*, 34th Session, Supplements 22 and 22A (A/34/22 and Add. 1); *ibid.*, 35th Session, Supplements 22 and 22A (A/35/22 and Add. 1-3); *ibid.*, 36th Session, Supplements 22 and 22A (A/36/22 and Add. 1 and 2); *ibid.*, 37th Session, Supplement 22 (A/37/22); *ibid.*, 38th Session, Supplement 22 (A/38/22). The Summary Records of the Committee appear in the A/AC.115/SR series.

<sup>96</sup> GA Res. 2671A (XXV) (8 December 1970).

<sup>97</sup> GA Res. 2045B (XX) (15 December 1965).

<sup>98</sup> GA Resolutions 616B (VII) (5 December 1952); 820 (IX) (14 December 1954); 917 (X) (6 December 1955); 1016 (XI) (30 January 1957); 1178 (XII) (26 November 1957); 1248 (XIII) (30 October 1958); 1375 (XIV) (17 November 1959); 1598 (XV) (13 April 1961); 1663 (XVI) (28 November 1961); 1761 (XVII) (6 November 1962); 2054 (XX) (15 December 1965); 2144 (XXI) (26 October 1966); 2439 (XXIII) (19 December 1968); 2506B (XXIV) (21 November 1969); 2671F (XXV) (8 December 1970); 2784 (XXVI) (6 December 1971); 2786 (XXVI) (6 December 1971); 2922 (XXVII) (15 November 1972); 2923E (XXVII) (15 November 1972); 3324E (XXIX) (16 December 1974); 3380 (XXX) (10 November 1975); 3411G (XXX) (10 December 1975); 31/80 (13 December 1976); 32/12 (7 November 1977); 33/103 (16 December 1978); 34/27 (15 November 1979); 35/39 (25 November 1980); 36/13 (28 October 1981); 37/47 (3 December 1982); 38/19 (22 November 1983). In addition, a resolution of 7 August 1953 declared that the policy of the South African Government was inconsistent with the principles contained in the Charter and with its obligations as a member State of the United Nations.

General Assembly Resolution 616A (VII) of 5 December 1952 established the United Nations Commission on the Racial Situation in the Union of South Africa which was composed of three experts on international law.<sup>99</sup> The purpose of this Commission was to study South African racial conditions in the light of the principles of the Charter. In its first report,<sup>100</sup> it concluded that the racial policies of *apartheid* and their consequences were contrary to the Charter. The International Court of Justice was no less unequivocal. In its advisory opinion on *Namibia*, it said that *apartheid*

constitute[s] a denial of fundamental rights [and] is a flagrant violation of the purposes and principles of the Charter.<sup>101</sup>

More specifically, the Special Committee Against *Apartheid* recently expressed its condemnation of any and all exchanges with racially selected South African sports teams on the ground that such exchanges violated not only the Olympic principle of non-discrimination in sport, but also the principles of the United Nations Charter.<sup>102</sup>

To condemn *apartheid*, the General Assembly promulgated an International Convention on the Suppression and Punishment of the Crime of *Apartheid*.<sup>103</sup> Article III of that Convention attaches international criminal responsibility to individuals, members of organizations, institutions and representatives of the State who directly 'abet, encourage or co-operate in the commission of the crime of *apartheid*'. The General Assembly also created an *Ad Hoc* Committee to draft a convention against *apartheid* in sports.<sup>104</sup> Thus, the policy of *apartheid* is a breach of the United Nations Charter. All of the United Nations instruments, including the International Convention on the Elimination of All Forms of Racial Discrimination, are aimed at eliminating this violation of the Charter.<sup>105</sup>

<sup>99</sup> They were: the Chairman, Herman Santa Cruz, former Permanent Representative of Chile to the United Nations, former President of ECOSOC 1950-1, former Member of the Commission on Human Rights 1947-53, and Member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at the time of appointment; Dantes Bellegarde, former Minister of Education of Haiti, former Representative of Haiti to the League of Nations, former Minister of Haiti in Paris, former Ambassador of Haiti to Washington and former Permanent Representative of Haiti to the United Nations; Henri Laugier, Professor at the Sorbonne, former Assistant Secretary-General in charge of the United Nations Department of Social Affairs 1946-51, Honorary President of the International League for the Rights of Man in New York and Member of the Executive Board of UNESCO at the time of appointment.

<sup>100</sup> *General Assembly Official Records*, 8th Session, Supplement 16 (A/2505).

<sup>101</sup> *Namibia case*, ICJ Reports, 1971, at p. 57.

<sup>102</sup> UN Doc. A/AC. 115/SR. 272 (24 January 1974).

<sup>103</sup> GA Res. 3068 (XXVIII) Annex, *General Assembly Official Records*, 28th Session, Supplement 30 (A/9030), pp. 75-7 (30 November 1973); reprinted in *International Legal Materials*, 13 (1974), p. 50; entered into force 18 July 1976.

<sup>104</sup> See below, nn. 155-7 at p. 219 and accompanying text.

<sup>105</sup> See, generally, Ténékidès, 'L'Action des Nations Unies contre la discrimination raciale', *Recueil des cours*, 168 (1980-III), p. 269. Arguably, the duty to prohibit *apartheid* and racial discrimination has become a norm of customary international law: *South West Africa cases (Second Phase)*, ICJ Reports, 1966, p. 6 at pp. 291 ff. (dissenting opinion, Judge Tanaka), 464 (dissenting opinion, Judge Padilla

(ii) *The Declaration*. In order to combat racial discrimination, the General Assembly adopted the United Nations Declaration on the Elimination of All Forms of Racial Discrimination.<sup>106</sup> That Declaration urged the adoption of a convention.

Two Articles of the Declaration are relevant. Article 2, paragraphs 1 and 2, provides:

1. No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.
2. No State shall encourage, advocate or lend its support, through police action or otherwise, to any discrimination based on race, colour or ethnic origin by any group, institution or individual.

Article 5 of the Declaration provides:

An end shall be put without delay to governmental and other public policies of racial segregation and especially policies of *apartheid*, as well as all forms of racial discrimination and separation resulting from such policies.

Along with the Declaration, and in order to implement the undertaking expressed in the Preamble of the Declaration to adopt national and international measures to eliminate discrimination, the General Assembly passed a resolution<sup>107</sup> requesting the Economic and Social Council to invite the Commission on Human Rights to give 'absolute priority' to the preparation of a draft international convention on the elimination of all forms of racial discrimination. The task was sub-delegated to the Sub-Commission on Prevention of Discrimination and Protection of Minorities which considered drafts in twenty-one meetings which took place between 13 and 29 January 1964.<sup>108</sup>

The Commission on Human Rights considered and revised the draft between 18 February and 13 March 1964<sup>109</sup> and produced its own draft.<sup>110</sup> This draft was submitted by the Economic and Social Council to the General Assembly, which in turn referred it to the Third Committee. It was discussed during the Committee's twentieth session between

Nervo); *Namibia case*, *ibid.* 1971, pp. 16, 57; *Barcelona Traction case (Second Phase)*, *ibid.* 1970, pp. 3, 32. See also Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 596-8. But the New Zealand Human Rights Commission is only empowered to report on standards of compliance with international *instruments* on human rights. Furthermore, the issues dealt with in this study involve sporting contacts with South Africa rather than any specific acts of racial discrimination or *apartheid* attributable to New Zealand. Thus non-discrimination as a rule of customary international law would seem to fall outside the scope of this study.

<sup>106</sup> GA Res. 1904 (XVIII) (20 November 1963).

<sup>107</sup> GA Res. 1906 (XVIII) (20 November 1963).

<sup>108</sup> UN Docs. E/CN. 4/Sub. 2/SR. 406-18 (13-21 January 1964); 420 (22 January 1964); 422-5 (23-7 January 1964); 427-9 (28-9 January 1964).

<sup>109</sup> UN Docs. E/CN. 4/SR. 775-810 (18 February-13 March 1964).

<sup>110</sup> UN Doc. A/5921, Annex (16 June 1965).

11 October and 15 December 1965.<sup>111</sup> The 'Third Committee's draft<sup>112</sup> was reported back to the General Assembly and adopted on 21 December 1965.<sup>113</sup>

If there is any doubt about the status of the Gleneagles Agreement as a treaty, there is no doubt about the status of the Convention. It is clearly a multilateral treaty of fundamental significance.

## 2. *Relevant provisions of the Convention*

Two provisions were invoked before the Human Rights Commission: Article 2, paragraph 1(b), and Article 3. Article 2, paragraph 1, provides:

States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

- ...  
 (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;  
 ...

Article 3 says:

States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

## 3. *The relationship between Articles 2 and 3*

The Sub-Commission on Prevention of Discrimination and Protection of Minorities recognized segregation and *apartheid* as a form of racial discrimination which had to be specifically dealt with. The initial question was whether they would be dealt with in one or two articles of the convention. A text was considered at the sixteenth session of the Sub-Commission.<sup>114</sup> A number of drafts were introduced which dealt with the duties of States.<sup>115</sup> A draft introduced by Messrs Capotorti of Italy and Calvocoressi of the United Kingdom did not include a specific reference to public policies of *apartheid*. The reference was omitted since the two delegates expected *apartheid* to be mentioned in a separate article listing specific policies that ought to be condemned.<sup>116</sup> The Sub-Commission agreed to this approach and selected their draft as a working draft.<sup>117</sup> Thus

<sup>111</sup> UN Docs. A/C. 3/SR. 1299-1302 (11-13 October 1965); 1304-16 (14-22 October 1965); 1318 (25 October 1965); 1344-58 (16-29 November 1965); 1361-8 (1-7 December 1965); 1373-4 (14-15 December 1965).

<sup>112</sup> UN Doc. A/6181, Annex (18 December 1965).

<sup>113</sup> UN Doc. A/20/PV. 1406 (21 December 1965).

<sup>114</sup> UN Docs. E/CN. 4/873; E/CN. 4/Sub.2/241 (11 February 1964).

<sup>115</sup> e.g. a Polish draft, E/CN. 4/Sub. 2/L. 308. See also *ibid.* at p. 23; a joint Russian and Polish draft E/CN. 4/Sub. 2/L. 314; and a Czech working paper E/CN. 4/Sub. 4/L. 234.

<sup>116</sup> UN Doc. E/CN. 4/Sub. 2/SR. 415 (20 January 1964).

<sup>117</sup> *Ibid.*

Article 2 was introduced to require States to prohibit *all* discriminatory acts. *Apartheid*, as a particularly blatant form of discrimination, was to be dealt with in a separate article.

The Sub-Commission originally considered the *apartheid* provision under the heading of Article V,<sup>118</sup> following Article 5 of the Declaration.<sup>119</sup> The words 'territories subject to their jurisdiction' were suggested by Mr Morris Abram of the United States.<sup>120</sup> Calvocoressi praised this amendment, pointing out that since *apartheid* could be interpreted as applying exclusively to South Africa, the amendment would help to make it clear that States were not being obliged to act in areas which were not subject to their jurisdiction.<sup>121</sup> The Chairman of the Sub-Commission then indicated that Article V, as amended, would follow Article II and become Article III of the draft convention.<sup>122</sup> The Third Committee<sup>123</sup> replaced the words 'subject to' with the word 'under'.<sup>124</sup>

Articles 2 and 3 must therefore be read together. Article 2 relates to racial discrimination and obliges States parties to 'condemn' it. Racial segregation and *apartheid* are forms of racial discrimination singled out in Article 3 for particular condemnation. But since they are forms of discrimination, all of the prohibitions in Article 2 apply *a fortiori* to segregation and *apartheid*.

The aim of the drafters was to create a convention which would embrace all forms of racial discrimination. There is no record of their having specifically discussed the question of whether Articles 2 and 3 would apply to a sporting team playing in the territory of a State party. None the less, the ordinary meaning of the words in context<sup>125</sup> would seem to make it clear that sporting teams are covered by Articles 2 and 3. Both refer to racial discrimination, which is defined in Article 1, paragraph 1, as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>126</sup>

Sporting contacts may not be political. They are not economic, and there is a difference of opinion as to whether they are cultural or social, and yet it

<sup>118</sup> The draft articles were originally assigned Roman numerals. The final text uses Arabic numerals.

<sup>119</sup> See text accompanying n. 106 at p. 209, above.

<sup>120</sup> E/CN. 4/Sub. 2/L. 308.

<sup>121</sup> UN Doc. E/CN. 4/Sub. 2/SR. 425 (27 January 1964).

<sup>122</sup> Ibid.

<sup>123</sup> UN Doc. A/C. 3/SR. 1308 (18 October 1965).

<sup>124</sup> A/C. 3/L. 1226 and Corr. 1.

<sup>125</sup> Vienna Convention, Article 31.

<sup>126</sup> For a discussion of the term 'public life', see Elkind, 'Discrimination: A Guide for the Fact Finder (International Convention on the Elimination of All Forms of Racial Discrimination)', *University of Pittsburgh Law Review*, 32 (1972), pp. 307, 310-19.

would be absurd to contend that they somehow stand outside the term 'public life'.<sup>127</sup>

Articles 2 and 3 both relate to State practice. They specifically impose certain prohibitions and duties upon States parties.

#### 4. *Article 2*

Sub-paragraph (b) of Article 2 (1) creates a duty not to 'sponsor, defend or support' racial discrimination.<sup>128</sup> In the words of one authority on the Convention, it

simply intends to prevent persons or organizations engaged in racial discrimination from getting the official support of the State.<sup>129</sup>

It is not, however, limited territorially. When a sporting team practises racial discrimination, the Government of a State party has a duty to avoid sponsoring the event either through financial support or by lending the event any official imprimatur.

The New Zealand Government, apparently in order to comply with its interpretation of the Gleneagles Agreement, in fact refrained from lending the Springbok rugby team any official or ceremonial support.<sup>130</sup> But it did grant temporary entry permits to members and officials of the team. In the view of the New Zealand Human Rights Commission:

a positive action by the Government such as issuing entry permits to a national South African rugby team does amount to support for the principle of racial discrimination.<sup>131</sup>

An equally serious violation of Article 2 was the use of the New Zealand Police Force.<sup>132</sup> Admittedly, the use of police power is essential for the maintenance of public order when it is threatened. Perhaps a simple announcement to the New Zealand rugby officials that they would have to police the matches themselves would have resulted in second thoughts about the tour. Each match was opposed by protest demonstrations aimed

<sup>127</sup> The Committee on the Elimination of Racial Discrimination (CERD) established under Articles 8 and 9 of the Convention to supervise its implementation has taken the view that sporting relations fall within the purview of Articles 2 and 3 of the Convention. See discussion below, nn. 159-87 at pp. 220-3 and accompanying text.

<sup>128</sup> Note that para. 4 of the Gleneagles Agreement obliges the parties to 'vigorously combat the evil of apartheid by withholding any form of support' for sporting contacts. See discussion above, nn. 93-4 at p. 206, and accompanying text.

<sup>129</sup> Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (2nd edn., 1980), p. 37.

<sup>130</sup> Furthermore, it was decided at a Cabinet meeting to withhold payment of the annual grant of \$NZ 10,000 to the Rugby Union as a symbolic gesture of disapproval of the tour: *NZ FAR*, 31 (1981), no. 1, p. 23.

<sup>131</sup> Loc. cit. above (p. 193 n. 19), at p. 10.

<sup>132</sup> On the subject of pre-tour planning, see Report of the New Zealand Police for the Year ended 31 March 1982, *Appendix to the Journals of the House of Representatives of New Zealand*, 1982, vol. vi, G.6, p. 3.

at forcing its cancellation. One justification for policing the tour was that it was necessary to protect demonstrators from angry spectators intent on watching the matches. And indeed, initially, the police acted impartially, separating the demonstrators from the spectators and keeping the peace. However, after the Hamilton match was cancelled on the recommendation of the police, a policy decision was taken by the Government that the tour would proceed and the Government decided to give the police resources to ensure that it would proceed.<sup>133</sup> After that, police tactics changed. The police began to cordon off whole city blocks and to deny access to anyone but residents, players, officials and spectators. Demonstrators who tried to challenge police lines were repulsed, sometimes with batons. Also, the New Zealand Army was used to provide support services.<sup>134</sup> The Government did not sponsor the tour, but it is difficult not to conclude that, when faced with a clear choice of whether to allow the tour to proceed after the match in Hamilton had been cancelled, a conscious decision was made to support the tour with police and military power.<sup>135</sup>

### 5. *Article 3*

Article 3 imposes an important additional undertaking. It is an undertaking on the part of States parties to 'prevent, prohibit and eradicate' all practices of *apartheid* in territories under their jurisdiction. The application of this Article to a tour by a South African sports team poses questions of interpretation and of fact.

We have already demonstrated that the term 'discrimination' applies to discrimination in sport. We have also shown that the terms 'segregation' and '*apartheid*' in Article 3 refer to a subclass of racial discrimination.<sup>136</sup> So we may conclude that Article 3 applies to *apartheid* in sport. The Article refers to 'all practices of *apartheid*' and requires that they be prevented, prohibited and eradicated. There is nowhere in the Convention any exception for international sporting events.

The Preamble to the Convention provides guidance as to the Convention's object and purpose. The fifth preambular paragraph refers to the Declaration on the Elimination of All Forms of Racial Discrimination and notes that it

solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations. . . .

The sixth paragraph records the conviction that:

<sup>133</sup> See above, n. 93 at p. 206 and accompanying text.

<sup>134</sup> The logistic contribution of the armed forces included the provision of Ministry of Defence aircraft flights: see above, p. 212 n. 132.

<sup>135</sup> Final cost of policing the tour was ultimately calculated to be in excess of \$NZ 7 million: *New Zealand Herald*, 28 July 1982, section 1, p. 1.

<sup>136</sup> See discussion above, nn. 114-27 at pp. 210-12 and accompanying text.

any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for such racial discrimination, in theory or in practice, anywhere.

The ninth paragraph cites the parties' alarm at continued manifestations of racial discrimination evidenced by

government policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation.

Probably the clearest evidence of the object and purpose of the Convention is the express reference to the policy of *apartheid*, which was intended to be a specific reference to the South African system.<sup>137</sup> Its use in Article 3 means that parties must not allow the South African practice of *apartheid* or any other form of racial segregation in their territories. Not only are they prohibited from adopting policies of *apartheid* similar to the South African system, but they must not allow South Africans to practise *apartheid* in their territories either. New Zealand has no authority over what South Africans do when they are in South Africa. In terms of Article 3, however, the question involves the nature of the activity which took place on New Zealand soil when the tour was allowed to proceed. This question turns on the word 'practices'.

When the question of compliance with the Convention came before the High Court of New Zealand, the interpretation of its provisions did not squarely arise for reasons which will become apparent in the second part of this study. In one of the few judicial suggestions about the interpretation of the Convention, the Chief Justice, Sir Ronald Davison, cited the definition of the word 'practice' in the *Shorter Oxford English Dictionary*.<sup>138</sup> It is defined as the 'action of doing something'. He suggested, without holding, that

it may well be open to argue . . . that in order to be within the terms of the Convention, the Springboks must be doing something to further apartheid in New Zealand before the Convention applies to them.<sup>139</sup>

He might have referred to another definition in the same dictionary, '[t]he habitual doing or carrying on of something'.<sup>140</sup>

The nature and composition of the team must affect the question of whether it is acceptable under the Convention. An all-white team chosen on the basis of race would be a segregated team and it would be practising

<sup>137</sup> UN Docs. E/CN. 4/Sub. 2/SR. 411 (16 January 1964), p. 3; 425 (27 January 1964), p. 4. But it is not confined to the practice prevailing in South Africa: see Lerner, *op. cit.* above (p. 212 n. 129), at pp. 41-2.

<sup>138</sup> Rev. edn., 1973, vol. 3, p. 645.

<sup>139</sup> *Ashby v. Attorney General*, High Court, Wellington Registry, A. 169/81, p. 16 (unreported). For observations made in the Court of Appeal see below, nn. 219-23 at p. 227 and accompanying text. The Convention is drafted in five official languages. Article 25 of the Convention provides that the Chinese, English, French, Russian and Spanish texts are equally authentic.

<sup>140</sup> A similar definition can be found in the *Concise Oxford Dictionary* (7th edn., 1982), p. 805.

segregation in New Zealand even if it did nothing more to further segregation there. In the event, the Springbok team had one 'coloured' player and one 'coloured' assistant manager. Under South Africa's Population Registration Act 1950, 'coloureds' are a mixed race group which occupies its own special place in the South African *apartheid* system. They are somewhat more privileged than blacks, but considerably less privileged than whites. There were no blacks in the Springbok team. It may not have been strictly segregated. But was it practising *apartheid*?

The New Zealand Rugby Football Union, in extending the invitation to the Springbok team, unilaterally concluded that the team was 'merit-selected'. It never published the criteria which it used to make this determination. Possibly it relied on the fact that mixed trials were held. But that, in itself, is by no means conclusive evidence of the nature of the team. For when an institution is shaped by *apartheid*, when the rules of *apartheid* dictate its formation and composition, it is practising *apartheid* wherever it goes.

The necessity of proving, as a matter of fact, that *apartheid* affected the nature of the South African team appeared to present something of an evidentiary problem. It would have been difficult to call a witness who would have been regarded as unbiased. Even those who had been to South Africa were likely to have come away with their prejudices confirmed.<sup>141</sup> The applicants before the Human Rights Commission submitted three reports which had been published by the United Nations Centre Against *Apartheid* on the current situation relating to sport in South Africa. Those reports were prepared by people who had been actively involved in sport in South Africa.<sup>142</sup> The New Zealand Rugby Football Union was offered the opportunity to submit evidence of its contention that the Springbok team had reached the stage of 'merit-selection', but declined to do so.

There seems to be no argument concerning the concept of *apartheid* itself even though the Government of South Africa prefers to use other terminology such as 'separate development'. South Africa has never denied the practice of *apartheid*.<sup>143</sup>

<sup>141</sup> The New Zealand Race Relations Conciliator, Mr E. Te R. Tauroa, who is a member of the New Zealand Human Rights Commission did accept a private invitation to visit South Africa. He stayed for a period of about three weeks during which time he conducted an unofficial fact-finding mission. Upon his return, on 23 June 1981, he stated his conclusion that the tour should not proceed and joined in the Commission's Report on the tour: *New Zealand Herald*, 26 June 1981, section 1, p. 3.

<sup>142</sup> United Nations Centre Against *Apartheid*, Notes and Documents, No. 12/80, Pather, 'Racism in South African Sport' (statement made before the Special Committee Against *Apartheid* on 28 March 1980: Mr Pather is Honorary Secretary of the South African Council on Sport (SACOS)); United Nations Centre Against *Apartheid*, Notes and Documents, Conf. 8, November 1977, Ramsamy, 'Non-Racial Sport in South Africa' (paper presented to the World Conference for Action against *Apartheid* (Lagos, 22-6 August 1977); id., loc. cit. above (p. 201 n. 74): Mr Ramsamy is the Chairman of the South African Non-Racial Olympic Committee (SAN-ROC)).

<sup>143</sup> See *South West Africa cases (Second Phase)*, ICJ Reports, 1966, at p. 285 (dissenting opinion of Judge Tanaka).

The doctrine of different treatment of diverse population groups constitutes a fundamental political principle by which [the South African Government] administers . . . the Republic of South Africa. . . .<sup>144</sup>

*Apartheid* speaks for itself. It is all-pervasive in South African life. Each person's political, civil and economic rights are determined by his or her race. The applicants cited a wide variety of South African statutes to demonstrate the all-encompassing nature of the *apartheid* system including the Population Registration Act 1950, the Prohibition of Mixed Marriages Act 1949, and (specifically relevant to sport) the Group Areas Act 1966, the Reservation of Separate Amenities Act 1953, the Blacks (Urban Areas Consolidation) Act 1945 and the Liquor Act 1977. The applicability of the last four statutes to sport was recognized by the South African Research Council which recommended certain changes to 'normalize' sport.<sup>145</sup> *Apartheid* is so all-pervasive in South Africa, however, that, even if such changes were made:

after the games and drinks, the players and spectators will have to return to their own group areas where *apartheid* will continue to be applied in virtually every other facet of life.<sup>146</sup>

The system relegates blacks to inferior housing, inferior education, inferior entertainment, inferior health-care and inferior job opportunities.<sup>147</sup>

Introducing General Assembly Resolution 2775D on *Apartheid* in Sports to the Special Political Committee on 12 November 1971, Mr Frank O. Abdulah, the representative of Trinidad and Tobago, summed up the point:

It is necessary, however, to emphasize that the picture [in South Africa] is not only one of segregation but of systematic racial discrimination as well. Opportunities and facilities for non-whites are inferior by far to those of their white counterparts. The premium value placed on whiteness ensures that white sportsmen can have the run of lavish facilities which are equal to those found in any part of the world, the black sportsman in South Africa is relegated to the dusty rutted sandtracks of the townships, with but few exceptions. Moreover, members of this Committee . . . [are] painfully aware of the lack of leisure, the low incomes and the debilitating health standards which the black African endures in the townships.

With the whole repressive system of *apartheid* weighing down upon him, the non-white sportsman in South Africa is *disqualified even before he starts* [emphasis added]. Such normal amenities as public parks and playgrounds are virtually

<sup>144</sup> *South West Africa cases (Second Phase)*, ICJ Reports, 1966, at p. 303; see also dissenting opinion of Judge Mbanefo at pp. 487-9. For more on the responsibility of a State for activities and events occurring within its own jurisdictional ambit, see *Corfu Channel case (Merits)*, ICJ Reports, 1949, pp. 4, 18.

<sup>145</sup> *Rand Daily Mail*, 25 September 1980.

<sup>146</sup> Ibid.

<sup>147</sup> On the treatment of blacks under South African law, see Dugard, *Human Rights and the South African Legal Order* (1978).

non-existent in non-white areas and the need for African and Indian sportsmen to obtain permits if they wish to play outside their home areas militates against competition even among the non-white groups themselves. . . .<sup>148</sup>

Genuine 'merit-selection' is not possible under the *apartheid* system. In the well-known words of Bishop Desmond Tutu, 'it is not possible to have normal sport in an abnormal society'.

New Zealanders who supported the tour argued that the presence of a 'coloured' player and a 'coloured' manager in the Springbok team meant that the South African Government was 'normalizing' its sporting policy and that therefore it could not be said that the team was practising *apartheid*. In answer to this, the applicants before the Human Rights Commission pointed to the 'homelands' or 'bantustan' policy as the single clearest piece of evidence that attempts to 'normalize' sport in South Africa can only be regarded as window-dressing. The Promotion of Black Self-government (*sic*) Act 1959 declares that the black peoples of South Africa do not constitute an homogeneous people but form separate national units<sup>149</sup> on the basis of language and culture. The ultimate aim of the *apartheid* policy is the creation of a number of separate 'self-governing national units' or, as they are popularly called, 'Bantustans'. The National States Constitution Act 1971 (formerly referred to as the Bantu Homelands Constitution Act 1971) empowers the Government to grant constitutions to the territorial authorities of the 'homelands'. Four such homelands have been given their so-called 'independence'. The Transkei was the first in October 1976, Bophuthatswana followed in December 1977, Venda in September 1979 and Ciskei in December 1981. Independence for a fifth homeland, Kwa Ndebele, has been proposed and negotiations have begun.

Regarding the status of 'homeland citizens', the Status of the Transkei Act 1976, for example, provides that any person who is born in the Transkei, is directly descended from a 'Transkeian', was a citizen of Transkei before independence *or who has linguistic or cultural connections* with the Xhosa or Sotho groups in Transkei '*shall cease to be a South African citizen*'. Thus, the purpose of this policy is to implement the ultimate aim of the *apartheid* policy which is to strip every black South African of South African citizenship. If this policy is successful, then ultimately there will be no black South African sportspersons because there will be no black South Africans.

On the other hand, 'coloureds' are not regarded as blacks or 'bantus' under South African law. They are not affected by the homelands policy and will not lose their citizenship as a result of it. Therefore the presence of a 'coloured' player and a 'coloured' assistant manager does not demonstrate any change of policy toward people that South Africa regards as blacks. It cannot be regarded as a 'normalization' of sporting policy.

<sup>148</sup> As reproduced in Unit On *Apartheid*, Notes and Documents, No. 49/71, pp. 3-4.

<sup>149</sup> Formerly restricted to eight: Dugard, *op. cit.* above (p. 216 n. 147), at p. 90.

The legal effect of the homelands policy is to create a situation in which black South Africans are regarded as possessing one status under South African law and an entirely different status under international law. While South African blacks are being stripped of their citizenship under South African law and thus of their eligibility to participate in teams such as the Springboks, the rest of the world will still continue to regard them as South Africans. As South Africans they are, among other things, unlawfully barred on the basis of race from participating in South African sporting teams.

The United Nations General Assembly has condemned the bantustan policy many times.<sup>150</sup> The Security Council has also condemned it.<sup>151</sup>

Only South Africa has recognized the independence of these 'homelands'. New Zealand does not recognize the denationalization law as having any effect. Thus it must accept that millions of South Africans are barred, on the basis of race, from participating in South African international sporting teams.<sup>152</sup> So any South African team that plays in New Zealand is perforce practising *apartheid* regardless of any 'merit-selection' which allows those blacks that are still eligible to play.

#### 6. *Other sources for the interpretation of Articles 2 and 3*

Other sources confirm the interpretation advanced by the applicants. The sources cited were:

- (i) The practice of competent organs of the United Nations, in particular the General Assembly and the *Ad Hoc* Committee on the Drafting of an International Convention Against *Apartheid* in Sports;
- (ii) The practice of the Committee on the Elimination of Racial Discrimination; and
- (iii) Subsequent conduct of the parties.

Some of these sources regard contact with *apartheid* sport as a violation of Article 2. Others regard it as a violation of Article 3. Still others mention both Articles.

(i) *The United Nations*. Since 1947, the drafting of human rights treaties and declarations has proceeded from the general to the specific with each new step clarifying and expanding the obligations contained in

<sup>150</sup> GA Resolutions 2775E (XXVI) (29 November 1971); 2923E (XXVII) (15 November 1972); 3151G (XXVIII) (14 December 1973); 3324E (XXIX) (16 December 1974); 3411D (XXX) (28 November 1975); 31/6A (XXXI) (26 October 1976); 32/105N (14 December 1977); 34/93G (12 December 1979); 35/206A (16 December 1980); 36/172A (17 December 1981); 37/69A and B (9 December 1982); 38/39A (5 December 1983).

<sup>151</sup> SC Resolutions 402 (1976) of 22 December 1976; 407 (1977) of 25 May 1977.

<sup>152</sup> This ineligibility does not appear to have applied to white Rhodesians who were, in fact, permitted to play in South Africa's national sporting teams.

the previous one. Thus the Universal Declaration of Human Rights was aimed at clarifying and developing with greater specificity the human rights obligations contained in the United Nations Charter. Likewise, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Human Rights Covenants expand and clarify the provisions of the Universal Declaration of Human Rights. Thus, in examining subsequent instruments on racial discrimination and *apartheid*, it is justifiable to treat them as elaborations of the Racial Discrimination Convention and interpretative of its provisions.

A number of resolutions of the General Assembly particularly condemn *apartheid* in sport.<sup>153</sup> Of particular relevance is the Annex to General Assembly Resolution 32/105M of 14 December 1977 which contains the International Declaration Against *Apartheid* in Sports.<sup>154</sup> The third preambular paragraph of that Declaration refers to the Racial Discrimination Convention and recalls, in the language of Article 2 (1) (b), that States undertake not to sponsor, defend or support racial discrimination. Article 6 provides:

States shall deny visas and/or entry to representatives of sports bodies, members of teams or individual sportsmen from any country practising *apartheid*.

The Declaration and the other resolutions may legitimately be used as an aid to the interpretation of obligations under the Convention.

The *Ad Hoc* Committee responsible for drafting the Declaration on *Apartheid* in Sports has more recently been preparing the text of a draft convention against *apartheid* in sports.<sup>155</sup> The third preambular paragraph of the revised draft refers to the language of Article 3 of the Racial Discrimination Convention.<sup>156</sup> Article 7 of the draft requires States parties to deny visas and/or entry permits to sportsmen and officials from countries practising *apartheid*.<sup>157</sup>

These resolutions and drafts are not binding upon New Zealand.

<sup>153</sup> e.g. GA Resolutions 2775D (XXVI) (29 November 1971); 2923E (XXVII) (15 November 1972); 3151G (XXVIII) (14 December 1973); 3324E (XXIX) (16 December 1974); 3411E (XXX) (28 November 1975); 31/6F (9 November 1976); 32/105M (14 December 1977); 33/183N (24 January 1979); 34/93N (12 December 1979); 35/206E and M (16 December 1980); 36/172 I (17 December 1981); 37/69B and G (9 December 1982); 38/39D and K (5 December 1983). Resolution 36/172 I deplored '... the failure of several Governments to take firm action to terminate sporting contacts with South Africa, in particular the Governments of New Zealand and the United States of America, which have permitted tours by Springbok rugby teams despite widespread public protests in their countries and appeals by the Special Committee [Against *Apartheid*]'.

<sup>154</sup> New Zealand and fourteen other members abstained from supporting this resolution: see UN Doc. A/32/PV. 102, para. 212 (14 December 1977).

<sup>155</sup> GA Res. 31/6F (9 November 1976); *General Assembly Official Records* (GAOR), 33rd Session, Supplement 36 (A/33/36); GA Res. 33/183N (24 January 1979); GAOR, 34th Session, Supplement 36 (A/34/36); GA Res. 34/93N (12 December 1979); GAOR, 35th Session, Supplement 36 (A/35/36); GA Res. 35/206M (16 December 1980); GAOR, 36th Session, Supplement 36 (A/36/36); GA Res. 36/172I (17 December 1981); GAOR, 37th Session, Supplement 36 (A/37/36); GA Res. 37/69G (9 December 1982); GAOR, 38th Session, Supplement 36 (A/38/36); GA Res. 38/39K (5 December 1983).

<sup>156</sup> GAOR, 38th Session, Supplement 36 (A/38/36), p. 5.

<sup>157</sup> *Ibid.*, at p. 7.

However, by replicating the language of the Convention, they furnish convincing evidence of the nature of the obligations imposed by it.<sup>158</sup>

(ii) *The Committee on the Elimination of Racial Discrimination*. The Committee on the Elimination of Racial Discrimination (hereinafter the Committee) was established under the Convention to supervise its implementation.<sup>159</sup> It consists of eighteen experts, who must be individuals of 'high moral standing and acknowledged impartiality'.<sup>160</sup>

The Committee has made two important interpretative rulings on the obligations arising for States parties under Article 3 of the Convention. In its General Recommendation III of 18 August 1972, the Committee ruled that any measures taken to implement United Nations resolutions concerning relations with 'racist' regimes in Southern Africa were pertinent to the obligations undertaken by States under Article 3 of the Convention to 'particularly condemn racial segregation and *apartheid*'. This ruling has been accepted by many of the States parties, including New Zealand, and endorsed by the General Assembly.<sup>161</sup>

The Committee's recently revised guidelines on information requested in States' reports asks for:

Information on the status of diplomatic, economic and other relations between the reporting State and the racist régimes of southern Africa, as requested by the Committee in its *General Recommendation III* of 18 August 1972 and *decision 2 (XI)* [Committee's emphasis] of 7 April 1975.<sup>162</sup>

Decision 2 (XI) of 7 April 1975<sup>163</sup> declares that

all policies, practices or relations which have the effect of supporting, sustaining or encouraging racist régimes are . . . inconsistent with the specific commitment

<sup>158</sup> In support of this approach, refer to the dissenting opinion of Judge Tanaka in the *South West Africa* cases (*Second Phase*), *ICJ Reports*, 1966, at pp. 292-3.

<sup>159</sup> It held its first meeting on 19 January 1970. The reports of the Committee appear in *General Assembly Official Records*, 25th Session, Supplement 27 (A/8027); *ibid.*, 26th Session, Supplement 18 (A/8418); *ibid.*, 27th Session, Supplement 18 (A/8718); *ibid.*, 28th Session, Supplement 18 (A/9018); *ibid.*, 29th Session, Supplement 18 (A/9618); *ibid.*, 30th Session, Supplement 18 (A/10018); *ibid.*, 31st Session, Supplement 18 (A/3118); *ibid.*, 32nd Session, Supplement 18 (A/3218); *ibid.*, 33rd Session, Supplement 18 (A/3318); *ibid.*, 34th Session, Supplement 18 (A/3418); *ibid.*, 35th Session, Supplement 18 (A/3518); *ibid.*, 36th Session, Supplement 18 (A/3618); *ibid.*, 37th Session, Supplement 18 (A/3718); *ibid.*, 38th Session, Supplement 18 (A/3818). State reports appear in the CERD/C/SR series. For a discussion of the practice of the Committee, see Buergenthal, 'Implementing the UN Racial Convention', *Texas International Law Journal*, 12 (1977), p. 187.

<sup>160</sup> Article 8.

<sup>161</sup> GA Res. 3266 (XXIX) (10 December 1974), *General Assembly Official Records*, 29th Session, Supplement 31 (A/9631), pp. 87-8. See also discussion of the Resolution by the Committee in the Report of the Committee on the Elimination of Racial Discrimination, *ibid.*, 30th Session, Supplement 18 (A/10018), paras. 9-12. See also GA Res. 34/28, *ibid.*, 34th Session, Supplement 46 (A/34/46), pp. 166-7. For recent developments see GA Res. 36/12, *ibid.*, 36th Session, Supplement 51 (A/36/51), pp. 162-3, and *ibid.*, 37th Session, Supplement 18 (A/3718), para. 24; GA Res. 37/46, *ibid.*, 37th Session, Supplement 51 (A/37/51), pp. 180-1, and *ibid.*, 38th Session, Supplement 18 (A/3818), para. 21; GA Res. 38/21 (22 November 1983).

<sup>162</sup> *Ibid.*, 35th Session, Supplement 18 (A/3518), Annex IV, p. 148.

<sup>163</sup> *Ibid.*, 30th Session, Supplement 18 (A/10018), Chapter VII, p. 68.

of States parties to condemn racial segregation and *apartheid* in accordance with Article 3 of the Convention. . . .

The Committee has considered the relationship between Article 3 and sporting contacts with South Africa on a number of occasions.<sup>164</sup>

New Zealand's initial report<sup>165</sup> was considered on 1 April 1974.<sup>166</sup> The report discussed the issue of sporting contacts in relation to Article 2 (1) (b). It stated that the proposed tour by the Springbok team was called off in April 1973.<sup>167</sup> The Committee expressed its appreciation at the measure taken by New Zealand.<sup>168</sup>

New Zealand's second periodic report<sup>169</sup> was considered on 8 April 1976.<sup>170</sup> Under the heading 'Condemnation of racial segregation and apartheid in accordance with Article 3 and in accordance with General Recommendation III adopted by the Committee at its 112th meeting', the report noted the change in policy of the New Zealand Government as regards sporting contacts with South Africa. It stated:

Essentially the Government believes that decisions about whether or not to play sport with other countries should rest with the sporting bodies concerned and that the Government should not seek to impose its views.<sup>171</sup>

The Committee discussed this new policy in a critical vein. Some members expressed the hope that New Zealand would reconsider its position.<sup>172</sup> New Zealand's third periodic report<sup>173</sup> was considered on 29 and 30 March 1979.<sup>174</sup> The report notes the 'promulgation' of the Gleneagles Agreement and its acceptance by the Government of New Zealand and states:

Since that time there have been no sporting contacts of any significance with South Africa.<sup>175</sup>

Members of the Committee expressed concern that New Zealand did not appear to be taking sufficient measures to implement its obligations under Article 3. The hope was expressed that the Government would

<sup>164</sup> See, e.g., Uruguay, supplementary report, discussed 16 October 1972, CERD/C/SR. 143; Trinidad and Tobago, second periodic report, discussed 28 July 1978, CERD/C/SR. 393; Philippines, fifth periodic report, discussed 27 March 1979, CERD/C/SR. 410; Mexico, second periodic report, discussed 28 March 1979, CERD/C/SR. 411-12; Australia, initial report, discussed 6 and 12 April 1977, CERD/C/SR. 329-30 and 335; Canada, fourth periodic report, discussed 6 April 1979, CERD/C/SR. 425-6; India, fifth periodic report, discussed 3 August 1979, CERD/C/SR. 441-2; Norway, fifth periodic report, discussed 2 and 3 April 1980, CERD/C/SR. 470-1; Argentina, sixth periodic report, discussed 5 August 1980, CERD/C/SR. 480; Philippines, sixth periodic report, discussed 3 and 4 August 1982, CERD/C/SR. 577-8; Argentina, seventh periodic report, discussed 4 August 1982, CERD/C/SR. 578-9.

<sup>165</sup> CERD/C/R. 50/Add. 8 (19 February 1974).

<sup>167</sup> Loc. cit. above (n. 165), at paras. 25-7.

<sup>169</sup> CERD/C/R. 77/Add. 7 (5 March 1976).

<sup>171</sup> Loc. cit. above (n. 169), at paras. 8-10.

<sup>173</sup> CERD/C/37 (22 May 1978).

<sup>175</sup> Loc. cit. above (n. 173), at paras. 11-12.

<sup>166</sup> CERD/C/SR. 181.

<sup>168</sup> Loc. cit. above (n. 166).

<sup>170</sup> CERD/C/SR. 282-3.

<sup>172</sup> Loc. cit. above (n. 170).

<sup>174</sup> CERD/C/SR. 414-15.

eventually sever all contacts with South Africa. Concern was expressed by some members who noted that New Zealand took a selective approach to United Nations decisions concerning *apartheid*. They urged the adoption of a more decisive attitude.<sup>176</sup>

New Zealand's fourth periodic report<sup>177</sup> was considered on 5 and 6 August 1981.<sup>178</sup> In connection with Article 3, the report notes that, during the period under review (i.e. 1 January 1978–31 December 1979),

no New Zealand national [sports] team competed in South Africa, nor did any team claiming to represent South Africa visit New Zealand. At the individual level there were no significant contacts.

The New Zealand State Services Commission, in accordance with the Government's policy on discouraging sporting contacts with South Africa, does not grant leave or leave without pay to civil servants for the purposes of competing in sporting events where it is known, in advance, that South Africans will also be participating.<sup>179</sup>

Some members of the Committee, referring to the then current Springbok tour, observed that it was difficult to understand what had prevented the New Zealand Government from officially banning entry of the team.<sup>180</sup>

New Zealand's fifth<sup>181</sup> and sixth<sup>182</sup> periodic reports were considered on 6 and 7 March 1984.<sup>183</sup> The fifth report discusses the report of the New Zealand Human Rights Commission and its conclusions. In response to the conclusion that Article 3 of the Racial Discrimination Convention requires the New Zealand Government to prevent and prohibit the tour, the fifth periodic report quotes the Acting Prime Minister, Mr D. MacIntyre:

The essence of the Commission's view is that the tour should not proceed. That has been the Government's position from the outset. To the extent that the Commission goes beyond this, to recommend that the Government prevent the tour from taking place, it is seeking a reversal of the Government's longstanding policy reaffirmed and endorsed at the last two General Elections. The Government has made it abundantly clear that it is not prepared to refuse passports or visas to sportsmen.<sup>184</sup>

The sixth periodic report contains very little discussion of Article 3. It simply states that the Government had 'continued actively to discourage sporting contacts in accordance with the Gleneagles Agreement and the

<sup>176</sup> Loc. cit. above (n. 174).

<sup>177</sup> CERD/C/48/Add. 10 (2 February 1981).

<sup>178</sup> CERD/C/SR. 531–2.

<sup>179</sup> Loc. cit. above (n. 177), at paras. 29–30.

<sup>180</sup> Loc. cit. above (n. 178).

<sup>181</sup> CERD/C/75/Add. 14 (24 October 1983).

<sup>182</sup> CERD/C/106/Add. 10 (9 January 1984).

<sup>183</sup> CERD/C/SR. 652–3. As of March 1985, the summary records of the Committee's discussions of these reports are not available.

<sup>184</sup> Loc. cit. above (n. 181), at para. 39.

basic principles of United Nations resolutions on the subject'.<sup>185</sup> It further noted that 'the 1981 Springbok tour has been the only significant contact since the Gleneagles Agreement was adopted in 1977'.<sup>186</sup>

What emerges from these discussions is that the Committee as a whole considers that sporting relationships fall within the purview of the Convention and that the denial of entry to sportspersons and officials from countries practising *apartheid* is required by Articles 2 and 3.

Curiously, the Committee's discussion of Article 3 focuses on the obligation to 'condemn' rather than the obligation to 'prevent, prohibit and eradicate'. The Committee's position may, in one respect, be stronger than the one advanced in the present study. That argument would seem to pertain only to sporting activity conducted by a South African team in the territory of a party. The Committee's view is applicable to sporting contacts conducted by a State party in South Africa as well. On the other hand, the Committee's emphasis on the obligation to 'condemn' begs the question of the mode of implementation. It is quite possible to 'condemn' *apartheid* and still argue that this places one under no obligation to prevent what private sporting organizations choose to do, as the New Zealand Government did indeed argue with respect to the Gleneagles Agreement.

The obligation to 'prevent' and 'prohibit' is much more specific. According to the interpretation advanced in this study, the parties' obligations and the mode of implementation under the Convention can be precisely defined. Under Article 2, the parties are to refrain from sponsoring, defending or supporting any sporting contacts with South Africa. Under Article 3 they are to prevent and prohibit any *apartheid* sporting contacts from taking place on their soil.

In addition, the attitude of some members of the Committee (and the material on subsequent conduct in the next section) show that there is a prevailing view that Article 3 involves an obligation to ban sporting contacts *tout court*.

(iii) *Subsequent conduct of the parties*.<sup>187</sup> In their reports, Argentina,<sup>188</sup> Australia,<sup>189</sup> Canada,<sup>190</sup> Ethiopia,<sup>191</sup> Finland,<sup>192</sup> India,<sup>193</sup> Norway<sup>194</sup> and Togo,<sup>195</sup> among others, expressly cite a policy of denying visas and/or

<sup>185</sup> Loc. cit. above (n. 182), at para. 20.

<sup>186</sup> Ibid.

<sup>187</sup> The present authors are not aware whether or not any of the States parties to the Convention have expressed to the New Zealand Government the view that the tour was a violation of the Convention.

<sup>188</sup> CERD/C/91/Add. 8 (24 February 1982).

<sup>189</sup> CERD/C/R. 85/Add. 3 and Corr. 1 (5 January 1977); CERD/C/16/Add. 4 (3 May 1979).

<sup>190</sup> CERD/C/52 (4 December 1978); CERD/C/50/Add. 6 (29 October 1980); CERD/C/76/Add. 6 (18 January 1983).

<sup>191</sup> CERD/C/31 (16 May 1978); CERD/C/46/Add. 3 (19 October 1979).

<sup>192</sup> CERD/C/50/Add. 3 (14 November 1979).

<sup>193</sup> CERD/C/20/Add. 34 (8 March 1979).

<sup>194</sup> CERD/C/50/Add. 5 (21 December 1979).

<sup>195</sup> CERD/C/75/Add. 12 (8 April 1983).

entry to South African sportspersons and officials as a measure taken in furtherance of the obligation imposed by Article 3 of the Convention. Mexico<sup>196</sup> and Trinidad and Tobago<sup>197</sup> cite their denial of visas in relation to their obligation under Article 2 (1) (b). Other reporting States have referred to the imposition of travel prohibitions and restrictions in general terms.<sup>198</sup>

New Zealand's recent reports also accept the applicability of Articles 2 (1) (b) and 3 to the question of sporting relations but seek to justify continued contacts. These justifications have not been accepted. In fact, members of the Committee have criticized New Zealand sports policy for its inconsistency with obligations under Article 3 of the Convention.<sup>199</sup>

The applicants before the Human Rights Commission were thus able to show that, of the then 107 States parties to the Convention, only eight had allowed South African sportspersons to participate in sporting events held in their territory since the passage of the International Declaration Against *Apartheid* in Sports in 1977. Approximately ninety States had taken steps to prohibit and prevent South African sportspersons from entering their territories. In its report the Commission accepted that:

the policies of many countries in refusing entry permits or visas to South African sports teams is a support for the view that this Convention is to be interpreted as requiring New Zealand to prevent and prohibit the Springbok Tour.<sup>200</sup>

It was particularly impressed by the fact that Australia, Canada, France and Fiji, 'countries like New Zealand', have a policy of refusing entry to South African sports teams. They are the ones that 'for various reasons, New Zealanders can more readily identify with'.<sup>201</sup> The Commission concluded that:

A Springbok team is the national rugby team of South Africa, a country in which racial segregation is a systematic legally enforced policy. Thus the team is inevitably bound up with and a reflection of that system. The possible inclusion of one or more black or coloured players as an exception to the general policy does not deny or cancel out the true legal situation. It is not the playing of rugby that is in question, but the action of the New Zealand Government in issuing entry permits which it has no obligations to do to a national team from South Africa. The mere existence of the team, as a national team of a country committed to *apartheid*, means that if New Zealand were to grant entry permits to such a team then it would be failing to prevent and prohibit the practice of *apartheid* in New Zealand.<sup>202</sup>

<sup>196</sup> CERD/C/16/Add. 1 (23 May 1978).

<sup>197</sup> CERD/C/29/Add. 1 (25 September 1978).

<sup>198</sup> See, e.g., Cyprus, CERD/C/66/Add. 3 (21 December 1979); Pakistan, CERD/C/66/Add. 10 (4 March 1980); Philippines, CERD/C/20/Add. 9 (8 February 1978).

<sup>199</sup> See discussion above at nn. 169-86 at pp. 221-3 and accompanying text.

<sup>200</sup> Loc. cit. above (p. 193 n. 19), at p. 9.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid., at p. 8.

Despite the Commission's function, under section 6 of the Human Rights Commission Act, the New Zealand Government refused to acknowledge the Commission's findings as authoritative. The Prime Minister peremptorily dismissed the report<sup>203</sup> and the Minister of Immigration announced his intention to issue permits to members and officials of the Springbok rugby team. In view of these statements an action was then commenced in the High Court of New Zealand to compel the Minister of Immigration to take New Zealand's international legal obligations into account when exercising his discretion in the granting of permits.

### III. THE COURTS

#### (a) *In the High Court*

The case of *Ashby v. Attorney General*<sup>204</sup> was heard in the High Court on 9 and 10 July 1981 by the Chief Justice, Sir Ronald Davison, who dismissed the application. The case raises important questions of fact and law. It involves the exercise of discretionary power conferred on the Minister of Immigration by section 14 of the Immigration Act 1964.<sup>205</sup> That provision gives the Minister a discretion to grant or to refuse temporary entry permits to persons who land in New Zealand.<sup>206</sup> The applicants claimed that the Minister's stated intention to grant permits to members and officials of the Springbok team was unlawful because it was the Minister's duty to exercise his discretion in a manner which was consistent with New Zealand's international obligations under the Convention.

The Minister claimed that his proposed decision was based on the Government's policy not to withhold temporary permits from a person or persons desiring to enter New Zealand for purposes of sporting activities.<sup>207</sup> The Chief Justice accepted that the Minister's discretion was reviewable in the courts,<sup>208</sup> but he noted that the Convention could not have been in Parliament's contemplation when the Immigration Act was passed in 1964. Therefore Parliament very clearly did not intend that the Convention should be taken into account when the discretion granted by the Act was exercised.<sup>209</sup> He thought that the applicants' argument, if accepted, would deprive the Minister of any discretion at all. He did not think that the Convention should be 'elevated' to the status of domestic law binding upon the Minister:

<sup>203</sup> *New Zealand Herald*, 29 June 1981, section 1, p. 1. See also text accompanying n. 184 at p. 222, above.

<sup>204</sup> Loc. cit. above (p. 214 n. 139).

<sup>205</sup> See above, nn. 72 and 73 at p. 201, and accompanying text.

<sup>206</sup> See above, n. 73 at p. 201, and accompanying text.

<sup>207</sup> Loc. cit. above (p. 214 n. 139) at p. 3. See also above, nn. 70 and 71 at p. 200, and accompanying text.

<sup>208</sup> Ibid., at p. 7. Affirmed on appeal with the exception of Richardson J, who held that the exercise of the discretion under section 14 was not a justiciable issue. For further discussion see below, n. 317 at p. 242, and accompanying text.

<sup>209</sup> Ibid., at pp. 11-12.

The law in New Zealand, as in England and in many other Commonwealth countries, has long been settled to the effect that a treaty such as the Convention is, is not such an Act as standing alone forms part of the municipal law of New Zealand.<sup>210</sup>

He noted that New Zealand had implemented the Convention by means of the Race Relations Act 1971 which does not specifically deal with entry permits for South African sportspersons.<sup>211</sup> He accepted, *a contrario*, that an international convention such as the Racial Discrimination Convention should be taken into account in exercising ministerial discretion. But it must be considered along with other matters such as ministerial policy:

In the present case, however, I am asked not simply to interpret s 14(1) of the Immigration Act but to decide what matters the Minister should take into account in exercising the discretion given to him under that section.

...

Where then, as in the present case, the Minister is given a wide discretion in deciding whether or not to issue a visa, if New Zealand has entered into an international convention which deals with matters relevant to the exercise of that discretion then such should be taken into account along with all other matters such as Government policy and the extent to which the Government has already implemented the terms of the Convention by passing the Race Relations Act 1971 which on its face appears not to require the Minister to refuse a visa in the circumstances of the present case.<sup>212</sup>

But he was not prepared to find that the Minister had *not* considered the Convention in exercising his discretion.<sup>213</sup>

### (b) *In the Court of Appeal*

The applicants immediately appealed to the Court of Appeal and the appeal was heard on 14 and 15 July 1981.<sup>214</sup>

In view of the finding by the Chief Justice that the Convention was a relevant consideration, the Court of Appeal<sup>215</sup> gave the Crown the opportunity to provide an affidavit from the Minister of Immigration stating whether he had taken the Convention into account in the course of

<sup>210</sup> Loc. cit. above (p. 214 n. 139), at p. 9, citing (at pp. 9-11) *The Parlement Belge* (1879), 4 PD 129, 154 (per Sir Robert Phillimore); *Mortensen v. Peters* (1906), 8 F (Court of Sess.) 93, 100 (per Lord Justice-General Dunedin); *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] AC 326, 347 (per Lord Atkin); *Chung Chi Cheung v. The King*, [1939] AC 160, 167-8, [1938] 4 All ER 786, 790 (per Lord Atkin); *Hoani Te Heuheukino v. Aotea District Maori Land Board*, [1941] AC 308, 324, [1941] 2 All ER 93, 98, [1941] NZLR 590, 596-7 (per Viscount Simon LC); *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, 143, [1966] 3 All ER 871, 875 (per Diplock LJ); *Ahmad v. Inner London Education Authority*, [1978] QB 36, 41, [1978] 1 All ER 574, 577 (per Lord Denning MR). Some commentators might feel that New Zealand law should be 'elevated' to the status of compliance with the Convention.

<sup>211</sup> Loc. cit. above (p. 214 n. 139), at pp. 11 and 15.

<sup>212</sup> Ibid., at p. 15.

<sup>214</sup> Oral judgments were delivered on 15 July 1981: see [1981] 1 NZLR 222, *sub nom.* *Ashby v. Minister of Immigration*.

<sup>213</sup> Ibid., at p. 17.  
<sup>215</sup> Ibid., Cooke J at p. 224.

his decision to grant entry permits. The relevant paragraph of the affidavit for present purposes is paragraph 4, which stated forthrightly that, when the Minister made his decision, in his own words:

I did not specifically have before me or consider the terms of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>216</sup>

The appellants attempted to argue: (1) that the Minister was bound to consider the Convention and that failure to do so meant that his discretion under the Immigration Act had not been exercised properly; and (2) that the Minister's statutory discretion should be construed in the light of New Zealand's international legal obligations under the Convention, and that, considered in that light, the Minister had no power to grant entry permits to members and officials of the Springbok team.<sup>217</sup> Each of the three judges regretted the lack of time available to consider these points.<sup>218</sup>

As to the interpretation of the Convention, Richardson J accepted that the decisions of the Committee of Experts established by the Convention 'clearly indicate that sporting relations with regimes practising apartheid are considered by the Committee to fall within the scope of the Convention'.<sup>219</sup> Cooke J<sup>220</sup> and Somers J,<sup>221</sup> on the other hand, were not prepared to accept the Committee of Experts as authoritative. Somers J noted that the Convention did not say, in so many words, that it applied to sporting relations.<sup>222</sup> Cooke J observed that the Committee 'is evidently not a court or judicial authority'.<sup>223</sup> Both of them<sup>224</sup> noted that the Gleneagles Agreement,<sup>225</sup> which specifically concerned sporting contacts, was, in fact, taken into account by the Minister.

With regard to the appellants' first argument, i.e. that the Minister was bound to consider the Convention, the judges were willing to accept, in principle, that treaties could be taken into account in interpreting domestic statutes.<sup>226</sup> As to the extent to which a treaty could influence the

<sup>216</sup> Ibid., Cooke J at p. 225.

<sup>217</sup> Ibid., Richardson J at p. 229.

<sup>218</sup> Ibid., Cooke J at p. 226; Richardson J at p. 228; Somers J at p. 234. But see Brookfield, 'Springboks and Visas', *New Zealand Law Journal*, 1982, p. 142 at p. 145.

<sup>219</sup> [1981] 1 NZLR 222, at p. 228.

<sup>220</sup> Ibid., at p. 226.

<sup>221</sup> Ibid., at p. 233.

<sup>222</sup> It is difficult to see how sport can fail to be covered by the term 'public life' in Article 1. See above, nn. 126 and 127 at pp. 211-12, and accompanying text.

<sup>223</sup> [1981] 1 NZLR 222, at p. 226. Moreover, after citing from Articles 2 and 3 of the Convention as follows: "Each State party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations" and "States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction", Cooke J commented: 'The words which I have emphasised leave real doubt as to whether there is any breach of the Convention in allowing a South African team to play in New Zealand': *ibid.*

<sup>224</sup> Ibid., Cooke J at p. 225; Somers J at p. 233.

<sup>225</sup> Quite by chance, the text of the Gleneagles Agreement was amongst the materials filed in court on behalf of the applicants. However, it formed no part of the appellants' (or the Government's) case and only assumed importance when raised by Cooke J during the course of argument.

<sup>226</sup> They variously cited *Van Gorkom v. Attorney-General*, [1977] 1 NZLR 535, 542-3 (*per* Cooke J);

exercise of statutory discretion, both Cooke J and Somers J were willing to accept that some treaty obligations might be so important that

the Courts might hold that Parliament could not possibly have meant to allow [them] to be ignored.<sup>227</sup>

But neither judge, perhaps because there was no express reference to sporting relations in the Convention, felt that the Convention fell into that category. Cooke J noted that the Immigration Act 1964 did not specify the criteria which were to be weighed by the Minister and commented:

it is only when a statute expressly or by implication identifies a consideration as one to which regard *must* [Cooke J's emphasis] be had that the Court can interfere for failure to take it into account. The mere fact that the consideration is one that could properly or reasonably be taken into account is not enough.<sup>228</sup>

With regard to the second argument, that the Minister's discretion ought to be exercised in accordance with the obligations under the Convention, all the judges recurred to the orthodox position, taken by the Chief Justice, that the Convention is not a part of New Zealand law and that, consequently, it could not affect, or still less override, the Minister's discretion under the Immigration Act. Richardson J (who also held that the subject-matter was not justiciable)<sup>229</sup> cited<sup>230</sup> *Attorney-General for Canada v. Attorney-General for Ontario*<sup>231</sup> to the effect that a treaty requires legislative implementation before it can become a part of New Zealand municipal law.

The decision to enter into treaty relations with other States is an exercise of the royal prerogative to conduct foreign affairs.<sup>232</sup> That much is indisputable. But the Court of Appeal (and the Chief Justice) seemed to assume that the mode of implementation of a treaty was also purely a matter of executive discretion and that the courts would not enquire into whether the steps taken to implement a treaty were adequate or whether they did in fact implement that treaty:

The Convention has been implemented in New Zealand by the Race Relations Act 1971, but no breach of that Act is alleged. If the Convention does have some wider scope, which is not clear, it has not as to any such wider scope been incorporated into New Zealand law by any Act of Parliament.<sup>233</sup>

*Ahmad v. Inner London Education Authority*, [1978] QB 36, 48, [1978] 1 All ER 574, 583 (*per* Scarman LJ, dissenting); *King-Ansell v. Police*, [1979] 2 NZLR 531 (CA); *R v. Wells Street Stipendiary Magistrate, ex parte Deakin, sub nom. Gleaves v. Deakin*, [1980] AC 477, 482-4, 494, [1979] 2 All ER 497, 498-9, 507 (*per* Lords Diplock and Keith of Kinkel respectively); *Morris v. Beardmore*, [1981] AC 446, 464, [1980] 2 All ER 753, 763-4 (*per* Lord Scarman).

<sup>227</sup> *Per* Cooke J, [1981] 1 NZLR at p. 226; *ibid.*, *per* Somers J at pp. 233-4. See also the extra-judicial observations of Cooke J in Cooke, 'The Courts and Public Controversy', *Otago Law Review*, 5 (1983), pp. 357, 364-5.

<sup>228</sup> *Ibid.*, at p. 225. See also *In re Findlay*, [1984] 3 WLR 1159, 1169 (*per* Lord Scarman).

<sup>229</sup> See below, n. 317 at p. 242, and accompanying text.

<sup>230</sup> [1981] 1 NZLR 222, 229.

<sup>231</sup> [1937] AC 326.

<sup>232</sup> *Blackburn v. Attorney-General*, [1971] 1 WLR 1037, [1971] 2 All ER 1380 (CA).

<sup>233</sup> *Per* Cooke J, [1981] 1 NZLR 222, 224.

Thus the four opinions raise a number of questions for our consideration:

- (1) whether it is necessary that Parliament clearly intend that a treaty be taken into account before courts can examine the exercise of a statutory discretion in the light of a treaty;
- (2) the extent to which courts can examine the adequacy of steps taken by the Crown to implement an international convention to which it has become a party;
- (3) the extent to which treaty law can be considered part of the law of New Zealand; and
- (4) the technical question of the power of a domestic authority (in this case, the courts) to compel the executive to observe the State's treaty obligations.

### (c) *Issues Presented by the Case*

#### 1. *Contemplation of the legislature*

The first question which needs to be considered is whether an international obligation must be within the contemplation of the legislature before it can be used to interpret legislation or to define a discretion granted by legislation. It is submitted that the proper rule is that legislation should be construed consistently with the State's international legal obligations wherever possible. Such obligations are legal obligations and should only be disregarded if the legislation is explicitly inconsistent or inconsistent by necessary implication:

there is a presumption, albeit rebuttable, that our municipal law will be consistent with our international obligations.<sup>234</sup>

This view is supported by the case law including cases decided by each of the appeal judges sitting on the bench in the *Ashby* case.<sup>235</sup>

Where a statute is aimed at implementing a treaty, the treaty can be used to interpret the statute.<sup>236</sup> The New Zealand authority on this point is

<sup>234</sup> *Attorney-General v. British Broadcasting Corporation*, [1981] AC 303, 354, [1980] 3 All ER 161, 177-8 (per Lord Scarman). See also *R v. Derry*, *Yearbook of the European Convention on Human Rights*, 20 (1977), pp. 827, 829; [1977] Crim. LR 550 (Northern Ireland Court of Criminal Appeal); *Ahmad v. Inner London Education Authority*, [1978] QB 36, 48; [1978] 1 All ER 574, 583 (per Scarman LJ, dissenting); *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625, 639 (per Gibbs CJ, dissenting). In our view, this rule does not require initial ambiguity in the words of the statute before the presumption applies.

<sup>235</sup> *Van Gorkom v. Attorney-General*, [1977] 1 NZLR 535; *Leave v. Immigration Department*, [1979] 2 NZLR 74, 79 (per Somers J, delivering the judgment of himself, Cooke J and Richardson J) (disapproved on another point in *Lesa v. Attorney-General of New Zealand*, [1983] 2 AC 20, [1982] 1 NZLR 165 (JC)). Remarks by Lord Diplock in *Garland v. British Rail Engineering Ltd.*, [1983] 2 AC 751, 771, [1982] 2 All ER 402, 415, apparently to the contrary need to be read in context and, in particular, in the light of the fact that the issue of antecedent legislation was not a live one in the case.

<sup>236</sup> *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, [1966] 3 All ER 871; *Post Office v. Estuary Radio Ltd.*, [1968] 2 QB 740, 756-7, [1967] 3 All ER 663, 682 (per Diplock LJ); *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG*, [1975] AC 591, 639-41, [1975]

*King-Ansell v. Police*.<sup>237</sup> That case involved a prosecution under section 25 of the Race Relations Act 1971 (NZ).<sup>238</sup> The long title of that Act recites that it is 'An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination'. Section 25, however, was not patterned on the provisions of the Convention but rather on section 6 of the Race Relations Act 1965 (UK).<sup>239</sup> That Act was drafted without reference to the Convention which was not adopted and opened for signature and ratification until December of that year. None the less, Richardson J said:

There is, too, a further consideration that applies to the interpretation of this legislation. As the long title states, the statute implements the International Convention on the Elimination of All Forms of Racial Discrimination.

...

And under Article 2 States parties to the Convention undertook to pursue by all appropriate means a policy of eliminating racial discrimination in all its forms. That background must be borne in mind in interpreting the relevant domestic legislation.<sup>240</sup>

Another case of interest is the decision of Cooke J (then sitting as a judge of the Supreme Court as the High Court was then called) in the case of *Van Gorkom v. Attorney-General*.<sup>241</sup> It dealt with a discretionary authority under sections 165 and 203 of the Education Act 1964 and the exercise of that discretion under a Regulation pursuant to that Act.<sup>242</sup> This Regulation empowered the Minister to lay down general conditions governing matters of salaries and staffing. Pursuant to that Regulation, paragraph C 28.3 of the Department's administrative manual provided

1 All ER 810, 837-8 (*per* Lord Diplock); *Benin v. Whimster*, [1976] 1 QB 297, [1975] 3 All ER 706 (CA); *The Eschersheim, The Jade*, [1976] 1 WLR 430, 436, [1976] 1 All ER 920, 924 (*per* Lord Diplock); *James Buchanan & Co. Ltd. v. Babco Forwarding & Shipping (UK) Ltd.*, [1978] AC 141, [1977] 3 All ER 1048 (HL); *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation*, [1978] AC 547, [1978] 1 All ER 434 (HL); *Quazi v. Quazi*, [1980] AC 744, 808-9, [1979] 3 All ER 897, 903 (*per* Lord Diplock); *Fothergill v. Monarch Airlines Ltd.*, [1981] AC 251, 282, [1980] 2 All ER 696, 707 (*per* Lord Diplock); *R. v. McCormick*, [1977] NI 105, 109, *Yearbook of the European Convention on Human Rights*, 21 (1978), pp. 789, 792 (*per* McGonigal LJ); *Koowarta v. Bjelke-Petersen* (1982), 56 AJLR 625, 639 (*per* Gibbs CJ, dissenting). This rule applies with special force when the statute in question is a constitutional document: *Ministry of Home Affairs v. Fisher*, [1980] AC 319, 328-30, [1979] 3 All ER 21, 25-7 (*per* Lord Wilberforce); *Riley v. Attorney-General of Jamaica*, [1983] 1 AC 719, 727-36, [1982] 3 All ER 469, 473-80 (*per* Lords Scarman and Brightman, dissenting), or has the character of a constitutional enactment: *Ahmad v. Inner London Education Authority*, [1978] QB 36, 48 and 50, [1978] 1 All ER 574, 583 and 585 (*per* Scarman LJ, dissenting); *Department of Labour v. Latailekepa*, [1982] 1 NZLR 632, 633 (*per* Woodhouse J); *ibid.* at 635-6 (*per* Richardson J); *ibid.* at 637 (*per* McMullin J).

<sup>237</sup> [1979] 2 NZLR 531 (CA).

<sup>238</sup> Section 25 creates an offence of inciting racial disharmony. See New Zealand Statutes, 1977, vol. 4, pp. 3601-2.

<sup>239</sup> See Elkind, 'Race Relations: Repeated Intervention', in Elkind (ed.), *The Impact of American Law on English and Commonwealth Law: a Book of Essays* (1978), p. 40.

<sup>240</sup> [1979] 2 NZLR 531, 540. See also *ibid.*, *per* Woodhouse J at pp. 536-7.

<sup>241</sup> [1977] 1 NZLR 535, affirmed on other grounds [1978] 2 NZLR 387 (CA).

<sup>242</sup> Regulation 16 (2) of the Education (Salaries and Staffing) Regulations 1957 as substituted in 1973 by Amendment No. 12 (SR 1973/29).

that a male teacher was permitted full removal expenses for himself and his family if promoted from one permanent position to another. A female teacher, if she had a husband able to support her, was permitted only her own personal removal expenses. Cooke J held that this form of discrimination was not within the four corners of the sub-delegated authority.<sup>243</sup> He found no hint in either the Act or the Regulations of any intention to authorize discrimination on the ground of sex alone. He even discovered in the Act 'some indication that Parliament is not in favour of such discrimination'.<sup>244</sup> Of specific relevance to the present discussion is his reference to certain non-binding international instruments such as the Universal Declaration of Human Rights<sup>245</sup> and the United Nations Declaration on the Elimination of Discrimination Against Women adopted by the General Assembly in 1967.<sup>246</sup> Concerning these Declarations he said:

Obviously these very general statements are not directed specifically to such narrow questions as removal expenses. Nor are they part of our domestic law. They represent goals towards which members of the United Nations are expected to work.<sup>247</sup>

He then cited Halsbury's *Laws of England*<sup>248</sup> to the effect that '[t]hey may be regarded . . . as representing a legislative policy which might influence the courts in the interpretation of statute law'.

If non-binding declarations may so influence the courts, how much more persuasive is a convention which represents a binding legal obligation. *Van Gorkom's* case applied to the exercise of a discretion and it may be noted that Cooke J did not find it necessary to suggest that the Declarations cited were in the contemplation either of those who drafted the statute or of those who drafted the Regulation when they did so.

There is a distinction between the *Van Gorkom* case and the *Ashby* case. The former case challenged the exercise of a discretion on the ground that the consideration taken into account was not justified by legislative policy as evidenced by the Declarations. In the latter case, the appellants tried to show that the Convention actually imposed a condition which they felt ought to be taken into account in the exercise of the statutorily granted discretion. In neither case was the international instrument within the contemplation of the drafters. Nor is this necessary. Such a discretion is better viewed as an empty bag which is filled from time to time with varying contents such as policy considerations, prerogative powers, considerations of State security and defence, and international legal obligations.<sup>249</sup> A discretion should be regarded as providing

<sup>243</sup> [1977] 1 NZLR 535, 541.

<sup>244</sup> Ibid.

<sup>245</sup> Articles 2 and 23 (2).

<sup>246</sup> GA Res. 2263 (XXII) (7 November 1967), Article 10 (1). See now Convention on the Elimination of All Forms of Discrimination Against Women, loc. cit. above (p. 196 n. 46), at p. 195, Article 11 (1).

<sup>247</sup> [1977] 1 NZLR 535, 543.

<sup>248</sup> 4th edn. (1974), vol. 8, para. 844.

<sup>249</sup> *Gleaves v. Deakin*, [1980] AC 477, [1979] 2 All ER 497; *McInnis v. The Queen* (1979), 143 CLR 575, 588 and 593 (per Murphy J, dissenting); *Allgemeine Gold- und Silberscheideanstalt v. Customs and Excise Commissioners*, [1980] QB 390, 407, [1980] 2 All ER 138, 144 (per Sir David Cairns).

sufficient flexibility to adjust to such changes within the limits set by law.<sup>250</sup>

These observations are specifically relevant to New Zealand law when we consider the Human Rights Commission Act. Section 5 (1) (e) of that Act gives the Commission the function of working toward the repeal of legislation which conflicts with the letter and spirit of the Act, the spirit of the Act being defined by certain international obligations. Section 6 of the Act, which has been discussed above,<sup>251</sup> empowers the Commission to recommend legislative action to give effect to international instruments on human rights. Thus, harmonization and consistency with international instruments on human rights would seem to be a general legislative policy applicable to the whole of New Zealand statute law. International instruments on human rights are always to be within the contemplation of the New Zealand legislature in its consideration of legislation. To deny this is to court the absurdity that Parliament can enact a law which the Human Rights Commission must immediately work to repeal pursuant to its duty under section 5 (1) (e). Likewise, international instruments on human rights are, or ought to be, always within the contemplation of officers of the Government and Government officials in the conduct of their administrative and legislative duties.<sup>252</sup>

## 2. Adequacy of implementation

Surprisingly, it was argued on behalf of the Government that the Race Relations Act 1971 constituted a full implementation of New Zealand's obligations under the Convention. The Chief Justice,<sup>253</sup> Cooke J<sup>254</sup> and Richardson J<sup>255</sup> tended to accept that the Racial Discrimination Convention had been implemented by the Race Relations Act 1971. With respect, this is not accurate. The Race Relations Act purports to implement the Convention, but the question of whether it constitutes a full implementation or even an adequate implementation is very much open to doubt. The Race Relations Act does not incorporate any part of the Convention by

<sup>250</sup> *Laker Airways Ltd. v. Department of Trade*, [1977] QB 643, 704-6, [1977] 2 All ER 182, 192-3 (per Lord Denning MR).

<sup>251</sup> See above nn. 6 and 7 at p. 190 and accompanying text.

<sup>252</sup> *R v. Miah*, [1974] 1 WLR 683, 694, *sub nom. Waddington v. Miah*, [1974] 2 All ER 377, 379 (per Lord Reid); *Gleaves v. Deakin*, [1980] AC 477, [1979] 2 All ER 497; *Ministry of Home Affairs v. Fisher*, [1980] AC 319, 330, [1979] 3 All ER 21, 26-7 (per Lord Wilberforce); *R v. Secretary of State for Home Affairs, ex parte Bhajan Singh*, [1976] QB 198, 207-8, [1975] 2 All ER 1081, 1083 (per Lord Denning MR); *R v. Secretary of State for the Home Department, ex parte Phansopkar*, [1976] QB 606, 626, [1975] 3 All ER 497, 511 (per Scarman LJ); *R v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*, [1976] 1 WLR 979, 984H, [1976] 3 All ER 843, 847f-g (per Lord Denning MR). *Per contra*, *R v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*, [1976] 1 WLR 979, 984-5, [1976] 3 All ER 843, 847-8 (per Lord Denning MR); [1976] 1 WLR 979, 986, [1976] 3 All ER 843, 848-9 (per Roskill LJ); [1976] 1 WLR 979, 988, [1976] 3 All ER 843, 850-1 (per Geoffrey Lane LJ).

<sup>253</sup> Loc. cit. above (p. 214 n. 139), at p. 16.

<sup>254</sup> [1981] 1 NZLR 222, 224.

<sup>255</sup> *Ibid.*, at p. 229.

reference.<sup>256</sup> Nor does the language of the Act resemble the language of the Convention.<sup>257</sup> Much of its language comes from the United Kingdom Race Relations Act 1968<sup>258</sup> an Act which has since been repealed and replaced by the Race Relations Act 1976.<sup>259</sup>

For present purposes, we may discern two separate types of obligation imposed by the Convention. One is the obligation to pass legislation affecting private rights or relationships between individuals. These obligations are dealt with mostly in Articles 4 and 5. The other is an obligation with regard to State action—an obligation imposed directly upon the State and its organs.<sup>260</sup> These sorts of obligations are imposed generally by Articles 2, 3, 6 and 7. Legislation is the appropriate way to implement the former type of obligation. It is not usually appropriate to the latter type. That sort of obligation usually involves the adoption of policies and practices which are consistent with the Convention. The question of standards of compliance with international instruments is likely to become an issue of increasing importance in New Zealand and elsewhere. It will be important for judges to have a clear understanding of this issue.

### 3. *International law and domestic law*

This problem involves a number of distinct but interrelated problems. In the first place, it is useful to consider the place of international law in New Zealand domestic law. Next the place of treaty law as one species of international law must be considered. Is treaty law treated in the same way as international law in general? If it is not, the constitutional reasons for the difference in treatment must be examined. New Zealand is a parliamentary democracy with a Westminster system of government and with no written constitution. Hence, in considering New Zealand constitutional law we are considering English constitutional law as well.

The position that, under English constitutional law, treaty law<sup>261</sup> is not

<sup>256</sup> Cf. section 9 (2) of the Racial Discrimination Act 1975 (Australia), incorporating Article 5 of the Convention. See *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625.

<sup>257</sup> Cf. Racial Discrimination Act 1975 (Australia), section 9 (1), which adopts the definition of discrimination in Article 1 of the Convention.

<sup>258</sup> See Elkind, loc. cit. above (p. 230 n. 239), at pp. 94–105.

<sup>259</sup> It may be noted, by way of example, that during discussion of New Zealand's initial report (loc. cit. above, p. 221 n. 165) to the Committee on the Elimination of Racial Discrimination on 1 April 1974, members of the Committee expressed regret that section 25 of the Race Relations Act 1971 does not declare racist organizations illegal, as required by Article 4 of the Convention: CERD/C/SR. 181. There is also the question of evolving standards of compliance under the Convention. Stated briefly, the evolving nature of international human rights obligations, *semble* in accordance with 'the evolving standards of decency that mark the progress of a maturing society' (*Trop v. Dulles*, 356 US 86, 101 (1958), *per* Warren CJ), must make it doubtful that a municipal State can ever definitively fulfil such obligations.

<sup>260</sup> For a further discussion of these obligations see Elkind, loc. cit. above (p. 211 n. 126).

<sup>261</sup> For purposes of exposition, we exclude here the *sui generis* principle that treaties concluded by the Crown in the exercise of its prerogative rights to conduct war and make peace are directly applicable and justiciable in courts of law: see *The Parlement Belge* (1879), 4 PD 129, 150 (*per* Sir Robert Phillimore). See also Fawcett, *Application of the European Convention on Human Rights* (1969),

part of municipal law has the patina of orthodoxy,<sup>262</sup> but a closer examination will show that, as a statement of law, it is too broad.

Rules of treaty law are *lex inter partes*. They bind only some members of the international community, those who are parties. The other sources of international law, customary law and general principles of law, on the other hand, are binding on all members of the international community. They are frequently grouped under the heading of 'general international law'. General international law has usually been judicially regarded as a part of the law of England.<sup>263</sup>

Where a rule of international law conflicts with a statute, then the courts of the United Kingdom and New Zealand must apply the statute,<sup>264</sup> although legislation contrary to international law does not relieve a State of responsibility for a violation of international law.<sup>265</sup> With regard to the technical problem of providing for implementation in local law, there does not seem to be much difficulty.<sup>266</sup> In most of the above-cited cases, courts

p. 18 n. 1; O'Connell, *International Law* (2nd edn., 1970), vol. 1, pp. 58-9; Brownlie, *op. cit.* above (p. 208 n. 105), at p. 49. For an even wider view see *Francis v. The Queen*, [1956] SCR 618, 626, (1956) 3 DLR (2d) 641, 647 (*per* Rand J). See also Cohen and Bayefsky, 'The Canadian Charter of Rights and Freedoms and Public International Law', *Canadian Bar Review*, 61 (1983), pp. 265, 286 n. 81 and 292 n. 116 and accompanying texts. Furthermore, treaty provisions which codify or crystallize rules of customary international law are part of English (and New Zealand) law.

<sup>262</sup> The courts do, however, take judicial notice of treaties: *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116; *Post Office v. Estuary Radio Ltd.*, [1968] 2 QB 740; *Ashby v. Attorney General*, *loc. cit.* above (p. 214 n. 139), *sub nom.* *Ashby v. Minister of Immigration*, [1981] 1 NZLR 222. See also sections 37 and 38 Evidence Act 1908 (NZ), *Reprinted Statutes of New Zealand*, vol. 2, pp. 359-60.

<sup>263</sup> *West Rand Central Gold Mining Co. Ltd. v. The King*, [1905] 2 KB 391, 406-7 (*per* Lord Alverstone CJ). This doctrine goes back to *Barbuit's case* (1737), Forr. 280, 25 ER 777, in which Lord Chancellor Talbot laid down the doctrine that the *jus gentium* (law of nations) in its fullest extent was and formed part of the law of England. See also *Triquet v. Bath* (1764), 3 Burr. 1478, 97 ER 936; *The Charkieh* (1873), 4 A & E 59 (Ct. of Adm.); *Anglo-Iranian Oil Co. Ltd. v. Jaffrate (The Rose Mary)*, (1953) 1 WLR 246, 253 and 259 (*per* Campbell J); *Cheney v. Conn (Inspector of Taxes)*, [1968] 1 WLR 242, 245, [1968] 1 All ER 779, 780-1 (*per* Ungood-Thomas J); *Oppenheimer v. Cattermole*, [1976] AC 249, 278, [1975] 1 All ER 538, 567 (*per* Lord Cross of Chelsea); [1976] AC 249, 283, [1975] 1 All ER 538, 572 (*per* Lord Salmon); *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 QB 529, 553-4, [1977] 1 All ER 881, 888-90 (*per* Lord Denning MR); [1977] 1 QB 529, 566-70, [1977] 1 All ER 881, 900-3 (*per* Stephenson LJ); [1977] 1 QB 529, 576-9, [1977] 1 All ER 881, 908-11 (*per* Shaw LJ); *Allgemeine Gold- und Silberscheideanstalt v. Customs and Excise Commissioners*, [1980] QB 390, 404, [1980] 2 All ER 138, 142 (*per* Lord Denning MR); [1980] QB 390, 406, [1980] 2 All ER 138, 144 (*per* Bridge LJ); [1980] QB 390, 407, [1980] 2 All ER 138, 144 (*per* Sir David Cairns). *Per contra*, *R v. Keyn (The Franconia)* (1876), 2 Ex. D 63, 202-3 (*per* Cockburn CJ).

<sup>264</sup> *Mortensen v. Peters* (1906), 8 F (Court of Sess.) 93, 101 (*per* Lord Justice-General Dunedin); *Croft v. Dunphy*, [1933] AC 156, 164, [1932] All ER Rep. 154, 158 (*per* Lord Macmillan); *Polites v. The Commonwealth* (1945), 70 CLR 60, 68-9 (*per* Latham CJ); *ibid.* at p. 74 (*per* Rich J); *ibid.* at pp. 75-6 (*per* Starke J); *ibid.* at p. 78 (*per* Dixon J); *ibid.* at p. 79 (*per* McTiernan J); *ibid.* at p. 81 (*per* Williams J); *Collco Dealings Ltd. v. Inland Revenue Commissioners*, [1962] AC 1, 19, [1961] 1 All ER 762, 765 (*per* Viscount Simonds); [1962] AC 1, 24, [1961] 1 All ER 762, 768 (*per* Lord Guest); *Woodend (KV Ceylon) Rubber and Tea Co. Ltd. v. Commissioner of Inland Revenue*, [1971] AC 321, 334-5, [1970] 2 All ER 801, 808 (*per* Lord Donovan).

<sup>265</sup> See *Anglo-Norwegian Fisheries case*, ICJ Reports, 1951, pp. 116, 181 (dissenting opinion of Judge McNair), citing the *Alabama Claims* arbitration (1870-1). See also separate opinion of Judge Alvarez, *ibid.*, at p. 152.

<sup>266</sup> The chief problem is an evidentiary one: *Compania Naviera Vascongado v. Steamship 'Cristina'*, [1938] AC 485, 497, [1938] 1 All ER 719, 725 (*per* Lord Macmillan); *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 QB 529, 569-70, [1977] 1 All ER 881, 902-3 (*per* Stephenson LJ); *Re*

have seen little difficulty in applying the rules of general international law to affect the outcome of the cases in question.

The *Ashby* case<sup>267</sup> and the cases cited therein<sup>268</sup> indicate that, in English and New Zealand law, treaties are treated differently from rules of general international law. They are not regarded as part of English and New Zealand law without legislative implementation. But is this the correct view?

The fundamental rule which endows the law of treaties (and indeed the law of contracts) with validity is expressed in the Latin maxim *pacta sunt servanda*.<sup>269</sup> Some writers treat the rule as a 'general principle of law'.<sup>270</sup> Others treat it as a rule of customary international law.<sup>271</sup> But it is in any event a rule of general international law.<sup>272</sup> Herein lies the contradiction.<sup>273</sup> As a rule of general international law, *pacta sunt servanda* should be regarded as part of the law of England and of New Zealand. How then is this to be squared with the rule that treaties are not part of English (and New Zealand) law until implemented by Parliament? The short answer is that it cannot be squared. The orthodox rule is too broad.

The orthodox approach postulates a rule of constitutional law to the effect that the Queen in Parliament has an absolute discretion as to whether to implement a treaty and as to its mode of implementation. If such a discretion exists, then *pacta sunt servanda* (as a principle of general international law) cannot be a part of English law. In effect, the *Ashby* case stands for the principle that, even where a treaty creates obligations to be implemented by State action, where no private rights are affected, the courts are powerless to consider them in the absence of an Act of Parliament. Usually an Act of Parliament will not be appropriate. Such obligations do not normally require any alteration to existing law. They stand to be implemented by the State adopting a policy consistent with them.

The constitutional rule on the position of treaty law in English municipal law has been traced back to the judgment of Sir Robert Phillimore in the important case of *The Parlement Belge*<sup>274</sup> who treated the

*Alberta Union of Provincial Employees et al. and the Crown in right of Alberta* (1981), 120 DLR (3d) 590 (Alta. QB). For discussion see Bendel, 'The International Protection of Trade Union Rights: A Canadian Case Study', *Ottawa Law Review*, 13 (1981), p. 169.

<sup>267</sup> Loc. cit. above (p. 214 n. 139), and [1981] 1 NZLR 222.

<sup>268</sup> i.e. the cases cited above, p. 226 n. 210; *Blackburn v. Attorney-General*, [1971] 1 WLR 1037, [1971] 2 All ER 1380 (CA), and *Rustomjee v. The Queen* (1876), 2 QBD 69, 74 (*per* Lord Coleridge CJ).

<sup>269</sup> Pacts are binding. See the preamble to the Vienna Convention, which says: 'the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized . . .'. See also Article 26: 'Every treaty is binding upon the parties to it and must be performed by them in good faith.'

<sup>270</sup> Lauterpacht, *Private Law Sources and Analogies* (1927, reprinted 1970), pp. 59 and 156; Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), p. 113; O'Connell, *op. cit.* above (p. 233 n. 261), at pp. 12-13.

<sup>271</sup> Elias, *The Modern Law of Treaties* (1974), p. 40; Kelsen, *Principles of International Law* (2nd edn., rev. and ed. Tucker, 1966), pp. 454-8; Oppenheim, *International Law*, vol. 1 (8th edn. by Lauterpacht, 1955), p. 880.

<sup>272</sup> See McNair, *The Law of Treaties* (1961), p. 493; Brownlie, *op. cit.* above (p. 208 n. 105), at p. 613.

<sup>273</sup> See above, n. 263 at p. 234, and accompanying text.

<sup>274</sup> (1879) 4 PD 129.

case as one of first impression.<sup>275</sup> The case involved an attempt by the Crown to confer immunity on a Belgian mail packet, based on a Convention between Her Majesty and the King of the Belgians, ratified on 24 March 1876.<sup>276</sup>

Phillimore held that the power of the Crown to make treaties with foreign States is indisputable.<sup>277</sup> He cited Blackstone on the King's prerogative:

It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes, for it is by the law of nations essential to the goodness of a league that it be made by the sovereign power; and then it is binding upon the whole community; and in England the sovereign power quoad hoc, is vested in the person of the king. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist or annul.<sup>278</sup>

Blackstone accepted that Parliament could check the power to some extent. But the only checks which he suggested involved punitive sanctions such as impeachment against ministers who concluded treaties 'which shall afterwards be judged to derogate from the honour and interest of the nation'.<sup>279</sup>

None the less, Phillimore concluded that Blackstone 'must have known very well that there were a class of treaties the provisions of which were inoperative without the confirmation of the legislature; while there were others which operated without such confirmation'.<sup>280</sup> These treaties were treaties which require no sanction from the legislature because they *do not affect private rights*.<sup>281</sup> He stressed that a treaty may be severable as to its provisions:

the validity of it cannot be challenged, speaking generally, by any private person; but a court of justice when called upon to execute the provisions of a treaty may, at the instance of a subject, who is affected by them, examine whether those provisions are such as to be capable of legal enforcement. . . .<sup>282</sup>

Sir Robert Phillimore was a conservative on the issue of the relationship between international law and municipal law. None the less, his opinion in *The Parlement Belge* must be taken as standing for a proposition which is rather more limited than the rule which is commonly quoted today. Those provisions of a treaty which affect private rights require legislative implementation.<sup>283</sup> Others do not.

<sup>275</sup> (1879) 4 PD 129, at p. 144.

<sup>276</sup> *Ibid.*, at pp. 131-5 and 149.

<sup>277</sup> *Ibid.*, at p. 149.

<sup>278</sup> *Commentaries* (21st edn., 1844), vol. 1, ch. 7, pp. 256-7.

<sup>279</sup> *Ibid.*, at p. 257.

<sup>280</sup> *The Parlement Belge* (1879), 4 PD 129, 150.

<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*, at p. 152.

<sup>283</sup> A number of the authorities cited by Davison CJ in the *Ashby* case (*loc. cit.* above, p. 214 n. 139) appear to support this more limited statement of the rule: see below, nn. 285-94 at pp. 237-8, and accompanying text. See also Brownlie, *op. cit.* above (p. 208 n. 105), at p. 49; Sinclair, 'Treaty Interpretation in English Courts: The Principles of Treaty Interpretation and their Application by the English Courts', *International and Comparative Law Quarterly*, 12 (1963), pp. 508, 525.

The judgment was reversed by the Court of Appeal<sup>284</sup> on the ground that the immunity was in fact available at customary international law and hence at common law.

It is regrettable that Phillimore treated the case as one of first impression since he thereby failed to expose fully the constitutional roots of the doctrine on which he relied. Apart from undoubtedly learned speculation about what Blackstone must have known, the case offers little authority for its *ratio decidendi*.

Professor Hood Phillips, an eminent English constitutional writer, has traced<sup>285</sup> the principle back to the *Case of Proclamations* in the seventeenth century; and specifically to Sir Edward Coke's holding 'that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament'<sup>286</sup> and 'that the King hath no prerogative, but that which the law of the land allows him'.<sup>287</sup> Thus did Coke establish the principle that the King cannot alter the private rights of the subject without the consent of Parliament. It follows from this that the Crown cannot affect private rights solely by exercising the prerogative to enter into a treaty which requires an alteration in private rights. The doctrine enunciated in the *Case of Proclamations* requires that such an alteration be submitted to Parliament. With this in mind, it is possible to take a closer look at some of the cases cited in the *Ashby* judgments.

*Attorney-General for Canada v. Attorney-General for Ontario*<sup>288</sup> involved three ILO Conventions dealing with hours of work, minimum wages and weekly rest, each of which purported to affect private rights. It was common ground that the statutes enacted to implement those Conventions affected 'property and civil rights within each Province', a matter which is assigned to the exclusive legislative jurisdiction of each Province under section 92 (13) of the Canadian Constitution Act (or, as it was then known, the British North America Act 1867). The Judicial Committee of the Privy Council held that the Dominion cannot, merely by making promises to foreign States, clothe itself with legislative authority which it would not otherwise have under the Constitution.<sup>289</sup>

<sup>284</sup> (1880) 5 PD 197; [1874-80] All ER Rep. 104.

<sup>285</sup> *Constitutional and Administrative Law* (6th edn., 1978), pp. 289 n. 46 and 446.

<sup>286</sup> (1611) 12 Co. Rep. 74, 75; 77 ER 1352, 1353.

<sup>287</sup> (1611) 12 Co. Rep. 74, 76; 77 ER 1352, 1354.

<sup>288</sup> [1937] AC 326. See also Cohen and Bayefsky, loc. cit. above (p. 233 n. 261), at pp. 291-3.

<sup>289</sup> It is in this context that we must understand Lord Atkin's famous statement that 'the performance of [treaty] obligations, if they entail alteration of the existing domestic law, requires legislative action': *ibid.*, at p. 347. His Lordship further explained: 'Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes': *ibid.*

The Dominion Parliament does not have an 'external affairs' power such as that found in section 51 (xxix) of the Australian Constitution. See *Dowal v. Murray* (1978), 143 CLR 410, 429-30 (*per* Murphy J); *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625.

The case resembles *Mortensen v. Peters*<sup>290</sup> in that the court was being asked to allow treaty obligations to override existing law, the British North America Act 1867. It also resembles the *Case of Proclamations*<sup>291</sup> in that it involves an attempt to use treaty obligations to override the constitutional apportionment of legislative power.

In a case on appeal from the Court of Appeal of New Zealand, *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*,<sup>292</sup> the Judicial Committee of the Privy Council held that rights purporting to be conferred by the Treaty of Waitangi, a treaty concluded between Her Majesty Queen Victoria and the Chiefs of the 'United Tribes of New Zealand', could not be enforced in the courts because they had not been implemented by an Act of the New Zealand Parliament.<sup>293</sup> But again, the appellant in that case was claiming specific rights concerning the ownership and possession of land.<sup>294</sup>

In *Chung Chi Cheung v. The King*, Lord Atkin accepted that, on any given judicial issue, courts seek to ascertain what the relevant rule of international law is and treat the rule thus found as incorporated into domestic law provided that it is not inconsistent with statute law or rules 'finally declared by [the State's] tribunals'.<sup>295</sup> In *Salomon v. Commissioners of Customs and Excise*, Diplock LJ (as he then was) opined that:

Where, by a treaty, Her Majesty's Government, undertakes . . . to secure a specified result *which can only be achieved by legislation* [emphasis added], the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations.<sup>296</sup>

The opinions of Lord Denning,<sup>297</sup> Lord Diplock,<sup>298</sup> Lord Reid,<sup>299</sup> Lord

<sup>290</sup> (1906) 8 F (Court of Sess.) 93.

<sup>291</sup> (1611) 12 Co. Rep. 74; 77 ER 1352.

<sup>292</sup> [1941] AC 308, [1941] 2 All ER 93, [1941] NZLR 590.

<sup>293</sup> The non-implementation of the Treaty of Waitangi is still an issue of considerable importance in New Zealand and a source of discontent among the Maori people.

<sup>294</sup> That the alteration of private rights was the decisive issue was made clear from a passage cited by Viscount Simon LC from the judgment of Lord Dunedin in *Vajesingji Joravarsingji v. Secretary of State for India* (1924), LR 51 Ind. App. 357, 360. See [1941] AC 308, 324-5, [1941] 2 All ER at 98, [1941] NZLR 590, 597. See also Oppenheim, op. cit. above (p. 235 n. 271), at p. 40, cited with approval in *Cheney v. Com (Inspector of Taxes)*, [1968] 1 WLR 242, 246, [1968] 1 All ER 779, 781 (*per* Ungood-Thomas J). Note that Australian authorities would appear to have rejected this analysis. See *Koowarta v. Bjelke-Petersen* (1982), 56 ALJR 625, 648 (*per* Mason J) and the authorities cited therein. See also *Simsek v. MacPhee* (1982), 148 CLR 636, 641-5 (*per* Stephen J); *Kioa v. Minister for Immigration and Ethnic Affairs* (1984), 55 ALR 669, 675-81 (*per* Northrop and Wilcox JJ), citing *Ashby v. Minister of Immigration*, [1981] 1 NZLR 222. For the Canadian position see *Francis v. The Queen*, [1956] SCR 618, (1956) 3 DLR (2d) 641.

<sup>295</sup> [1939] AC 160, 168; [1938] 4 All ER 786, 790. There may be room for debate whether this view encompasses conventional as opposed to general international law, but note the wide significance attached to it by Williams J in *Polites v. The Commonwealth* (1945), 70 CLR 60, 80-1.

<sup>296</sup> [1967] 2 QB 116, 143, [1966] 3 All ER 871, 875.

<sup>297</sup> *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, 141, [1966] 3 All ER 871, 874; *R v. Secretary of State for Home Affairs, ex parte Bhajan Singh*, [1976] QB 198, 207, [1975] 2 All ER 1081, 1083; *Allgemeine Gold- und Silberscheideanstalt v. Customs and Excise Commissioners*, [1980] QB 390, 403-4, [1980] 2 All ER 138, 141-2. Cf. *R v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*, [1976] 1 WLR 979, 984-5, [1976] 3 All ER 843, 847-8; *Panesar v. Nestlé Co. Ltd.*, [1980] ICR 144, 147.

Scarman,<sup>300</sup> Lord Widgery<sup>301</sup> and Lord Keith<sup>302</sup> all favour the rule that courts are, wherever possible, to interpret statutes consistently with treaty obligations.<sup>303</sup>

The *Ashby* case did not involve any alteration of law or private rights.<sup>304</sup> Private rights were not affected since no one has a right to a permit under the Immigration Act. Under the Immigration Act 1964, the Minister is given a very wide discretion to grant or deny permits. There are three pre-conditions to the exercise of this power:

- (a) the applicant must not be a prohibited immigrant;
- (b) the applicant must land in New Zealand without a permit; and
- (c) the applicant must prove to the Minister that he or she desires to enter New Zealand for the purposes stated in the Act.<sup>305</sup>

If the law had set out an exclusive list of permissible grounds for entry or even an exclusive list of matters to be taken into account in exercising the discretion, then the Courts would not have the power to impose additional considerations even if the Convention required such considerations to be taken into account. In such a case, the statute would be defective from the standpoint of international legal obligations and the State would incur international responsibility. But the courts could do nothing about it.

However, the Immigration Act does not do that. What it does (after the satisfaction of three pre-conditions) is hand the Minister an empty bag known as discretion. In the words of Chief Justice Davison, this discretion:

is indeed a very wide discretion and in its exercise weight will undoubtedly, and can undoubtedly, be given to the dictates of Government policy as it may exist from time to time.<sup>306</sup>

<sup>298</sup> *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, 143, [1966] 3 All ER 871, 875-6; *Gleaves v. Deakin*, [1980] AC 477, 482, [1979] 2 All ER 497, 498-9.

<sup>299</sup> *R v. Miah*, [1974] 1 WLR 683, 694, *sub nom. Waddington v. Miah*, [1974] 2 All ER 377, 379.

<sup>300</sup> *R v. Secretary of State for the Home Department, ex parte Phansopkar*, [1976] QB 606, 626, [1975] 3 All ER 497, 511; *Pan-American World Airways Inc. v. Department of Trade*, [1976] 1 Lloyd's Rep. 257, 261; *Ahmad v. Inner London Education Authority*, [1978] QB 36, 48, [1978] 1 All ER 574, 583; *Morris v. Beardmore*, [1981] AC 446, 464, [1980] 2 All ER 753, 763-4; *Attorney-General v. British Broadcasting Corporation*, [1981] AC 303, 354 and 362, [1980] 3 All ER 161, 177-8 and 183. Cf. *United Kingdom Association of Professional Engineers v. Advisory, Conciliation and Arbitration Service*, [1981] AC 424, 445-6, [1980] 1 All ER 612, 622.

<sup>301</sup> *R v. Secretary of State for Home Affairs, ex parte Bhajan Singh*, [1976] QB 198, 202; [1975] 3 WLR 225, 228.

<sup>302</sup> *Gleaves v. Deakin*, [1980] AC 477, 494, [1979] 2 All ER 497, 507.

<sup>303</sup> See also *Polites v. The Commonwealth* (1945), 70 CLR 60, 69 (*per* Latham CJ); *ibid.* at 77 (*per* Dixon J); *ibid.* at 81 (*per* Williams J); *Dowal v. Murray* (1978), 143 CLR 410; *McInnis v. The Queen* (1979), 143 CLR 575; *Kioa v. Minister of State for Immigration and Ethnic Affairs* (1984), 55 ALR 669, 689-90 (*per* Jenkinson J); *Halsbury's Laws of England* (4th edn., 1977, 1983), vol. 18, para. 1404, vol. 44, para. 908 respectively, and the authorities cited therein.

<sup>304</sup> With respect, Davison CJ and Cooke and Somers JJ were not correct when they protested that they were being asked to legislate.

<sup>305</sup> Section 14 (1). See text accompanying n. 73 at p. 201, above.

<sup>306</sup> *Loc. cit.* above (p. 214 n. 139), at p. 7.

But government policy is not the sole determining factor. As Lord Radcliffe persuasively observed in *Collco Dealings Ltd. v. Inland Revenue Commissioners*,

It is, no doubt, true that statutory words apparently unlimited in scope may be given a restricted field of application if there is admissible ground for importing such a restriction; and the consideration that, if not construed in some limited sense, they would amount to a breach of international law is well recognised as such a ground.<sup>307</sup>

It is, therefore, submitted that the rule of general international law, *pacta sunt servanda*, is part of English and New Zealand law cognizable in the courts, except to the extent that it is displaced by the special rule adopted to uphold the apportionment of constitutional powers. It is now recognized that the common law is to be elucidated having regard to the State's international legal obligations.<sup>308</sup> Judicial sentencing policies and discretion are also influenced by such matters.<sup>309</sup> Similarly, treaty provisions which impose obligations which can be implemented without legislation through, for instance, policy decisions lie outside the apportionment of powers mandated by the *Case of Proclamations* and a court can very properly consider that a minister has not exercised a discretion properly if he or she has disregarded or fails to implement these obligations.

Perhaps the most helpful judicial statement in the *Ashby* case was one made by Somers J:

I am prepared to assume (without deciding) that in the exercise of [his] discretion there may be some matters so obviously or manifestly necessary to be taken into account that a Minister acting reasonably would be bound to take them into account.<sup>310</sup>

<sup>307</sup> [1962] AC 1, 23, [1961] 1 All ER 762, 768, cited with approval by Lord Donovan in *Woodend (KV Ceylon) Rubber and Tea Co. Ltd. v. Commissioner of Inland Revenue*, [1971] AC 321, 334, [1970] 2 All ER 801, 808. See also *Polites v. The Commonwealth* (1945) 70 CLR 60, 77 (per Dixon J); *Laker Airways Ltd. v. Department of Trade*, [1977] QB 643. For an early instance of this principle, see *R v. Home Secretary, ex parte Château Thierry (Duke of)*, [1917] 1 KB 922, 929, [1916-17] All ER Rep. 523, 525 (per Swinfen-Eady LJ).

<sup>308</sup> *Blathwayt v. Baron Cawley*, [1976] AC 397, 425-6, [1975] 3 All ER 625, 636 (per Lord Wilberforce); *R v. Lemon*, [1979] AC 617, 665, [1979] 1 All ER 898, 927 (per Lord Scarman); *Dugan v. Mirror Newspapers Ltd.* (1979), 142 CLR 583, 606-9 (per Murphy J, dissenting); *McInnis v. The Queen* (1979), 143 CLR 575, 586-91 (per Murphy J, dissenting); *Attorney-General v. British Broadcasting Corporation*, [1981] AC 303, 354 and 362, [1980] 3 All ER 161, 177-8 and 183 (per Lord Scarman); *Raymond v. Honey*, [1983] 1 AC 1, 10, [1982] 1 All ER 756, 758-9 (per Lord Wilberforce); *Schering Chemicals Ltd. v. Falkman Ltd.*, [1982] 2 QB 1, 18-19, [1981] 2 All ER 321, 331 (per Lord Denning MR, dissenting). A number of Canadian authorities are collected in Cohen and Bayefsky, loc. cit. above (p. 233 n. 261), at p. 309 n. 212. Cf. *Attorney-General v. British Broadcasting Corporation*, [1981] AC 303, 352, [1980] 3 All ER 161, 176 (per Lord Fraser of Tulleybelton, dubitante).

<sup>309</sup> *Teare (Sergeant of Police) v. O'Callaghan* (1981), 4 EHRR 232, 237-8 (Isle of Man High Court of Justice); *McInnis v. The Queen* (1979), 143 CLR 575, 593 (per Murphy J, dissenting). See also *R v. Mahmood*, [1979] 1 NZLR 62, 64 (per Woodhouse J), where the principle of *non-refoulement* is applied *sub silentio*. (For subsequent developments see (1981-3) 3 New Zealand Administrative Reports 347.)

<sup>310</sup> [1981] 1 NZLR 222, 233-4. See also *In re Findlay*, [1984] 3 WLR 1159, 1169 (per Lord Scarman).

The International Convention on the Elimination of All Forms of Racial Discrimination is such a matter.

#### 4. *The power of the courts*

There remains to be considered the technical question whether the domestic decision-maker has an actual ability to give effect to the external obligation through the remedy applied for. A full canvas of this issue is beyond the scope of the present study, but it may be discussed in terms of the problems raised by the *Ashby* case.

In the first instance, the problem may be one of standing, in the sense of interest in the matter. The four applicants in the *Ashby* case were the Roman Catholic Bishop of Christchurch, the Assistant Anglican Bishop of Auckland, the Chairman of the Auckland District Maori Council, and a resident living in the vicinity of Eden Park, a stadium in which some of the matches were held. The first three applicants claimed a general interest in the maintenance of public order and harmonious race relations. The fourth applicant, as a resident and ratepayer of the area where matches were to be held, feared that the matches and the anticipated demonstrations would cause damage to his property, the possibility of physical harm to himself and his family and disturbance to his enjoyment of the peace of his home and the amenities of the neighbourhood.

The High Court was advised by the Solicitor-General that the issue of standing was not going to be raised by the Crown. Had it been raised then, said the Chief Justice,

serious consideration would have had to be given to the liberalizing trend being taken by the Courts in this matter.<sup>311</sup>

A deeper issue was raised in the New Zealand case of *Parsons v. Burk*.<sup>312</sup> This case involved no specific issue of public international law but it did involve an attempt by a private person to secure a court ruling on a matter commonly regarded as being a part of the royal prerogative. It involved an attempt in 1971 to invoke the ancient writ of *ne exeat regno* to prevent the New Zealand All Black rugby team from leaving the realm in order to tour South Africa on the ground that the tour would

<sup>311</sup> Loc. cit. above (p. 214 n. 139), at p. 5, citing *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] AC 617, 641 and 644, [1981] 2 All ER 93, 104 and 107 (per Lord Diplock). On this point reference should also be made to *Ingram v. The Commonwealth of Australia* (1980), 54 ALJR 395, 396-7 (per Gibbs ACJ); noted *Australian Law Journal*, 54 (1980), pp. 519, 615; appeal dismissed: see note, 55 ALJR 58 (HCA, 1981), where it was held that the plaintiff had no standing to sue for a declaration (or an injunction) in respect of the validity of Australian support for SALT II (Treaty on the Limitation of Strategic Offensive Weapons, Vienna, 18 June 1979), notwithstanding alleged violations of both general and conventional international law.

<sup>312</sup> [1971] NZLR 244. See also Bridge, 'The Case of the Rugby Football Team and the High Prerogative Writ', *Law Quarterly Review*, 88 (1972), p. 83.

bring Her Majesty and her Government and people here into hatred and contempt in the eyes of the majority of members of the United Nations and of the Commonwealth.<sup>313</sup>

After canvassing the authorities cited by counsel on each side, Hardie Boys J concluded that it did not lie 'in the right of the private citizen today to claim this ancient writ against another private citizen':

this Court would in my view be usurping the functions of the Queen's Ministers in New Zealand if on the application of a private citizen the Court in the name of the Queen in a matter of this kind permitted its writ to issue.<sup>314</sup>

In this vein, Davison CJ in the *Ashby* case suggested that the interpretation of New Zealand's international legal obligations under the Racial Discrimination Convention 'may more properly be a matter for the Minister [of Immigration] or the Government to decide',<sup>315</sup> rather than the courts:

If the Government through the Minister decides as a matter of policy on a particular course of action in relation to its international obligations and is in breach of those obligations, then there are ways of enforcing the international obligations between States, but the New Zealand Courts will not do so. The Courts are limited to deciding whether the Minister in this case in reaching a decision under s 14(1) [of the Immigration Act 1964] has properly directed himself in law; has taken into consideration the matters he ought to consider; and has reached a decision which is reasonable in the sense in which that term is used in administrative law.<sup>316</sup>

In the Court of Appeal Richardson J, for his part, observed:

I am not prepared to hold that . . . the exercise of the discretion under s 14 is a justiciable issue.

There are many reported cases in which Courts have decided for historical or policy reasons to decline to review the exercise of discretionary power. They are collected and discussed in *de Smith's Judicial Review of Administrative Action* (4th ed, 1980) pp. 286-298. Many such non-justiciable questions have a strongly political flavour. An obvious example is the conduct of foreign relations. . . . [And] [i]mmigration policy is a sensitive and often controversial political issue.<sup>317</sup>

<sup>313</sup> [1971] NZLR 244.

<sup>314</sup> *Ibid.*, at p. 248.

<sup>315</sup> *Loc. cit.* above (p. 214 n. 139), p. 17.

<sup>316</sup> *Ibid.*

<sup>317</sup> [1981] 1 NZLR 222, 230-1. His Honour referred to *Blackburn v. Attorney-General*, [1971] 1 WLR 1037, [1971] 2 All ER 1380, and in particular to the following passage from the judgment of Lord Coleridge CJ in *Rustomjee v. The Queen* (1876), 2 QBD 69, 74: 'She [i.e. the Queen] acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts.' See also *Civilian War Claimants Association Ltd. v. The King*, [1932] AC 14, 25-6, [1931] All

It would be mischievous to contend that there are no difficulties relating to judicial enforcement of international treaty obligations.<sup>318</sup> Treaties whose subject-matter is purely or essentially concerned with the international legal system, such as treaties dealing with boundaries, the acquisition of territory, guarantee, or public financial arrangements,<sup>319</sup> in principle should be left to be enforced by appropriate international legal remedies. These examples can, no doubt, be multiplied.<sup>320</sup> Furthermore, it has long been accepted that under the doctrine of parliamentary supremacy 'the sovereign power of the *Queen in Parliament* [emphasis added] extends to breaking treaties'.<sup>321</sup> However, in the case of human rights treaties, domestic judicial supervision makes sense since the object and purpose of such treaties is to protect and advance the rights of individuals (both nationals and aliens) within the State—the courts' traditional jurisdiction. It is accepted that even these treaties cannot give rise to private rights, if this would require an alteration of the law.<sup>322</sup> But when a treaty, such as the Racial Discrimination Convention, creates

ER Rep. 432, 435-6 (*per* Lord Buckmaster); *The Queen v. Operation Dismantle Inc. et al.* (1984), 3 DLR (4d) 193 (Fed. CA). But cf. *Laker Airways Ltd. v. Department of Trade*, [1977] QB 643, 704-6, [1977] 2 All ER 182, 192-3 (*per* Lord Denning MR); [1977] QB 643, 718-19, [1977] 2 All ER 182, 202-4 (*per* Roskill LJ); [1977] QB 643, 726-8, [1977] 2 All ER 182, 209-11 (*per* Lawton LJ).

<sup>318</sup> In *Malone v. Metropolitan Police Commissioner*, [1979] Ch. 344, 351-4 and 380, *sub nom.* *Malone v. Commissioner of Police of the Metropolis* (No. 2), [1979] 2 All ER 620, 626-8 and 649, Sir Robert Megarry V-C found it 'impossible to see how English law could be said to satisfy the requirements of [Article 8 of the European Human Rights] Convention' but at the same time held that the Court could not issue a declaration to that effect, nor, in his Lordship's opinion, were the issues to which the case gave rise 'suitable for determination by judicial decision' as they were 'essentially a matter for Parliament, not the courts'. In its decision of 17 December 1982, the European Commission on Human Rights expressed the opinion (by 11 votes, with 1 abstention) that there had been a breach of Article 8 and (by 10 votes to 1, with 1 abstention) that there had been a breach of Article 13. See *Malone v. United Kingdom* (1982), 5 EHRR 385. In its judgment of 2 August 1984, the European Court of Human Rights held unanimously that there had been a breach of Article 8 and (by 16 votes to 2) that it was not necessary to consider Article 13. See *Malone v. United Kingdom* (1985), 7 EHRR 14.

<sup>319</sup> *Republic of Italy v. Hambros Bank Ltd.*, [1950] Ch. 314, [1950] 1 All ER 430 (Ch. D); *Buttes Gas and Oil Co. v. Hammer* (Nos. 2 and 3), [1982] AC 888, 927, 930-8, [1981] 3 All ER 616, 625, 627-33 (*per* Lord Wilberforce).

<sup>320</sup> See, e.g., *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] 1 QB 529, 547-8 (submissions of F. P. Niell QC). Cf. the example cited in *Laker Airways Ltd. v. Department of Trade*, [1977] QB 643, 674 D-E, [1976] 3 WLR 537, 563 F-G (*per* Mocatta J). For an illuminating discussion see Jacomy-Millette, *Treaty Law in Canada* (English translation, 1975), pp. 131-75, 207-36.

<sup>321</sup> *Salomon v. Commissioners of Customs and Excise*, [1967] 2 QB 116, [1966] 3 All ER 871; *Post Office v. Estuary Radio Ltd.*, [1968] 2 QB 740, [1967] 3 All ER 663. See also above, n. 265 at p. 234, and accompanying text. *Pace* Davison CJ (see text accompanying note 316 at p. 242, above), this principle applies only to legislative action and in no way encompasses a mere policy decision by the Government intended (or otherwise) to violate international law.

<sup>322</sup> Traditionally the term 'law' has been taken to connote statute law and law finally declared by the courts: *Chung Chi Cheung v. The King*, [1939] AC 160, 168, [1938] 4 All ER 786, 790 (*per* Lord Atkin). In the light of the decision in *Trendtex Trading Corporation v. Central Bank of Nigeria*, it is submitted that the better view is that the rule should only apply to alterations in statute law: [1977] QB 529, 553-4, [1977] 1 All ER 881, 888-90 (*per* Lord Denning MR); [1977] QB 529, 576-9, [1977] 1 All ER 881, 908-11 (*per* Shaw LJ); see also above, n. 295 at p. 238, and accompanying text. For the position in Australia see *Simsek v. MacPhee* (1982), 148 CLR 636. *Quaere* whether the Committee for the Determination of Refugee Status, in that case, is bound to apply relevant international legal obligations and whether, under Australian law, its decision is reviewable for failure to do so.

obligations which purport to affect the conduct of the executive, there is no constitutional reason<sup>323</sup> why the executive's municipal powers cannot be considered in the light of relevant treaty obligations, and it would be wholly consistent with the judicial function to provide an authoritative interpretation of those obligations in determining whether they have been adequately considered by the executive and to hold that a discretion has been improperly exercised if the exercise is inconsistent with those obligations.<sup>324</sup>

#### IV. CONCLUSION

This study has been divided into two parts. The first part has canvassed the arguments made before the New Zealand Human Rights Commission to demonstrate that allowing the Springbok tour to proceed in New Zealand was a violation of the Gleneagles Agreement and the International Convention on the Elimination of All Forms of Racial Discrimination. The Human Rights Commission upheld the latter submission. It was not able to find that the Gleneagles Agreement is a treaty binding upon the New Zealand Government. The present study supports the view that permitting the Springbok tour to proceed was a violation of both the Gleneagles Agreement and the Convention but does not offer a conclusive view on the status of the Gleneagles Agreement. Arguments are strong either way. However, the study does demonstrate that a proper interpretation of the Agreement involves an obligation to discourage effectively all sporting contacts with South Africa and a duty to withhold any support for such contacts. Under the Human Rights Commission Act 1977, the Commission's reports on compliance with international human rights standards are not binding upon the Government and the Government took no notice of the Springbok tour report.

The question then arose whether and how the New Zealand Government could be held to its obligations. The second part of the study dealt with the attempt to bring the matter before the courts of New Zealand by asking them to hold that the ministerial discretion to grant temporary entry permits under the Immigration Act 1964 could only be properly

<sup>323</sup> For rejection of the argument impleading parliamentary accountability see *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.*, [1982] AC 617, 644, [1981] 2 All ER 93, 107 (*per* Lord Diplock). See also Cane, 'Prerogative Acts, Acts of State and Justiciability', *International and Comparative Law Quarterly*, 29 (1980), pp. 680, 700: 'Prerogative acts of foreign affairs which are not acts of State should be subject to judicial review in the same way and according to the same rules as acts done in exercise of discretionary powers.'

<sup>324</sup> Attention is drawn to the significant developments which have occurred in Canada as a result of the adoption of the Canadian Charter of Rights and Freedoms. See, e.g., *Re Mitchell and the Queen* (1984), 150 DLR (3d) 449 (Ont. HCJ); *Re Warren, Klagsbrun, Boyle and Costigan* (1983), 35 CR (3d) 173 (Ont. HCJ). See generally Tarnopolsky and Beaudoin, *The Canadian Charter of Rights and Freedoms: Commentary* (1982); McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (1982); Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act 1982* (1983); Cohen and Bayefsky, *loc. cit.* above (p. 233 n. 261); Mendes, 'Interpreting the Canadian Charter of Rights and Freedoms', *Alberta Law Review*, 20 (1982), p. 383.

exercised by taking into account the relevant obligations arising under the Convention.

There has been some judicial movement in Commonwealth jurisdictions in the direction of using treaty obligations as an aid in the interpretation of statutes but, generally, the courts have been unwilling to go much further than that.<sup>325</sup> Hood Phillips<sup>326</sup> argues that even this judicial practice is 'potentially dangerous' to the principles derived from the *Case of Proclamations* in that private rights might possibly be altered by interpretation on the basis of an instrument which has been ratified by executive action alone.

With respect to that eminent jurist, it seems that he is responding to the problems of a bygone era—an era which was marked by a struggle for supremacy involving the Stuart Kings, Parliament and proponents of the law. The problems of that era were best expressed four years before the *Case of Proclamations* in an exchange between King James I and Sir Edward Coke recorded in the case of *Prohibitions del Roy*:

the King was greatly offended, and said, that then he should be under the law which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*.<sup>327</sup>

Today, the struggle between the executive and the legislature is not nearly as acute as it was then. The executive at the time was the King or, more accurately, the King in Council. The executive today is composed of the Queen's ministers and their departments. In the United Kingdom the

<sup>325</sup> But see *Guilfoyle v. Home Office*, [1981] QB 309, 318, [1981] 1 All ER 943, 947 (per Lord Denning MR); [1981] QB 309, 319-20, [1981] 1 All ER 943, 948 (per O'Connor LJ); [1981] QB 309, 321, [1981] 1 All ER 943, 949 (per Sir John Megaw), where all three appeal judges expressly relied on Article 3 (2) of the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights (London, 6 May 1969: *European Treaty Series*, no. 67, *United Nations Treaty Series*, vol. 788, p. 243), notwithstanding its non-incorporation into domestic law. Petition to appeal dismissed: [1981] 1 WLR 1080. See also Duffy, 'English Law and the European Convention on Human Rights', *International and Comparative Law Quarterly*, 29 (1980), p. 585. The orthodox position is still frequently reaffirmed: see *R v. Chief Immigration Officer, Heathrow Airport, ex parte Salamat Bibi*, [1976] 1 WLR 979, 984-5, [1976] 3 All ER 843, 847-8 (per Lord Denning MR); [1976] 1 WLR 979, 986, [1976] 3 All ER 843, 848-9 (per Roskill LJ); [1976] 1 WLR 979, 988, [1976] 3 All ER 843, 850-1 (per Geoffrey Lane LJ); *Laker Airways Ltd. v. Department of Trade*, [1977] QB 643, 674, [1976] 3 WLR 537, 564 (per Mocatta J); [1977] QB 643, 717-18, [1977] 2 All ER 182, 202-3 (per Roskill LJ); *R v. Greater London Council, ex parte Burgess*, *The Times* (London), 18 April 1978; *Uppal v. Home Office*, *The Times* (London), 21 October 1978, *Yearbook of the European Convention on Human Rights*, 21 (1978), p. 797 at p. 797 (per Megarry V-C); affirmed on appeal on different grounds, 123 SJ 17 (1979), *Halsbury's Laws of England, Annual Abridgment*, 1978, para. 2155 (for subsequent developments see 3 EHRR 391 and 397); *Malone v. Metropolitan Police Commissioner*, [1979] Ch. 344, 351-4, 365-6 and 378-80, [1979] 2 All ER 620, 626-8, 637-8 and 647-9 (per Megarry V-C); *Surjit Kaur v. The Lord Advocate*, [1981] SLT 322, 326-30, [1980] 3 CMLR 79, 84-91 (per Lord Ross); *R v. Secretary of State for the Home Department, ex parte Fernandes*, *The Times* (London), 21 November 1980, *Current Law Year Book*, 1980, para. 1378 (DC); *Simsek v. MacPhee* (1982), 148 CLR 636; *Re Attorney-General of Canada and Stuart* (1982), 137 DLR (3d) 740, 748-9 (per Cowan DJ); *Re Vincent and Minister of Employment and Immigration* (1983), 148 DLR (3d) 385 (Fed. CA); *Kioa v. Minister for Immigration and Ethnic Affairs* (1984), 55 ALR 669 (Fed. C, Full C).

<sup>326</sup> Op. cit. above (p. 237 n. 285), at p. 446.

<sup>327</sup> (1607) 12 Co. Rep. 63, 64-5, 77 ER 1342, 1343. The King is under no man, but under God and the law.

Queen's ministers rule by virtue of the fact that they command a majority in the House of Commons. Her ministers in New Zealand rule by virtue of their majority in the House of Representatives. These majorities are usually kept intact by means of party discipline. Thus the issue needs to be redefined.

The issue today is, are the Queen's ministers under the law? In this case, the law in question is international law. Putting it another way, is executive policy unfettered, or is it subject to international law? It is, of course, subject to municipal law, but this is not a significant fetter in view of the ease with which municipal law can be changed by Parliament at the behest of the Government.

In most cases, there is no problem with international treaty law either. Where a treaty is perceived as being close to State interest, the executive will have no difficulty in procuring the necessary implementing legislation.

The problem arises in connection with treaties, such as human rights treaties, which States enter into in order to enhance their international images. Adherence to such treaties may be regarded as a ticket of admission to the club of civilized humanity. The obligations contained in such treaties are part of the price of admission to the club, but often these treaty obligations are not regarded as being essential to State interest. They may, in fact, interfere with the efficient conduct of State business, or they may be politically damaging internally. They may protect unpopular minorities or, in the situation discussed here, they may interfere with the enjoyment of a popular sport. Policing and enforcing such obligations become genuine problems.

It is for this reason that many human rights treaties recognize the desirability of submitting questions of compliance with their provisions to some independent and authoritative body for interpretation. Thus Article 25 of the European Convention on Human Rights<sup>328</sup> provides for the right of individual petition to the European Commission of Human Rights. Article 44 of the American Convention on Human Rights<sup>329</sup> allows the right of individual petition to the Inter-American Commission on Human Rights. And Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights<sup>330</sup> provides for communications to the Human Rights Committee, established under Part IV of the Cove-

<sup>328</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, *European Treaty Series*, no. 5, *United Nations Treaty Series*, vol. 213, p. 221, Council of Europe, *European Convention on Human Rights: Collected Texts* (7th edn., 1971), Sec. 1, Doc. 1. Entered into force 3 September 1953.

<sup>329</sup> American Convention on Human Rights, San José, 22 November 1969, *OAS Official Records*, OEA/Ser. K/XVI/I. 1, Doc. 65, Rev. 1, Corr. 2 (7 January 1970); reprinted in *Inter-American Commission on Human Rights, Handbook of Existing Rules Pertaining to Human Rights*, OEA/Ser. L/V/II. 50, Doc. 6, at 27 (1980). Entered into force 18 July 1978.

<sup>330</sup> GA Res. 2200A (XXI) Annex, *General Assembly Official Records*, 21st Session, Supplement 16 (A/6316), p. 59 (19 December 1966); *United Nations Treaty Series*, vol. 999, pp. 171, 302. Entered into force 23 March 1976.

nant, from individuals who claim that their rights as enumerated in the Covenant have been violated. Likewise, Article 14, paragraph 1, of the International Convention on the Elimination of All Forms of Racial Discrimination<sup>331</sup> provides that a State party may recognize the competence of the Committee on the Elimination of Racial Discrimination<sup>332</sup> to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State party. Such provisions for acceptance of the right of individual petition to an international forum are optional.

These conventions also encourage States parties to establish bodies within their national legal orders to receive and consider petitions or representations from individuals or groups. One such body is envisaged in Article 14, paragraph 2, of the Racial Discrimination Convention. Article 13 of the European Convention on Human Rights provides:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 2, paragraphs 2 and 3, of the International Covenant on Civil and Political Rights<sup>333</sup> contains a most forceful expression of this principle. It provides:

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.<sup>334</sup>

According to Schachter:

It is not enough for a party to say that it respects and ensures rights (the

<sup>331</sup> Loc. cit. above (p. 191 n. 10).

<sup>332</sup> See above, nn. 159 and 160 at p. 220, and accompanying text.

<sup>333</sup> GA Res. 2200A (XXI) Annex, *General Assembly Official Records*, 21st Session, Supplement 16 (A/6316), pp. 52-8 (19 December 1966); *United Nations Treaty Series*, vol. 999, pp. 171, 173-4. Entered into force 23 March 1976. New Zealand ratification deposited 28 December 1978.

<sup>334</sup> See also American Convention on Human Rights (loc. cit. above, p. 246 n. 329), Article 25.

obligation of result); it must also carry out the obligation to use the specified means required by Article 2 through its domestic legal system.<sup>335</sup>

New Zealand's response has been the establishment of its Human Rights Commission, with the significant drawback that the Government does not regard the Commission's interpretation of its legal obligations as authoritative. Nor has New Zealand yet ratified the Optional Protocol to the International Covenant on Civil and Political Rights or recognized the competence of the Committee on the Elimination of Racial Discrimination to receive petitions. It continues to insist, as staunchly as any East European State, on its right to auto-interpret its legal obligations on the basis of State policy and to resist authoritative interpretation. Perhaps this attitude is born of a perception, on the part of the New Zealand Government and the New Zealand public, that New Zealand's human rights record is superior to those of most of the other parties to these human rights treaties. This perception is undoubtedly accurate. But the attitude of the New Zealand Government is all the more distressing for that very reason. If the relationship between law and policy is only dimly understood and imperfectly applied by the New Zealand Government, it is hardly likely to be better understood or applied by States with poorer records.

The view that treaty obligations are not a part of English (or New Zealand) law is too broadly stated. Nor is it the law that private rights can only be affected by legislative implementation. Private rights can be and are affected by rules of general international law. The rule is that private rights, if they require alteration of the law, cannot be affected by executive action alone either by proclamation or by the ratification of a treaty. Executive policy is another matter. It is time to recognize that executive policy is subordinate to the law. *Quod Dux non debet esse sub homine, sed sub Deo et lege.*<sup>336</sup>

<sup>335</sup> 'The Obligation of the Parties to Give Effect to the Covenant on Civil and Political Rights', *American Journal of International Law*, 73 (1979), p. 462 at p. 462. See also Schachter, 'The Obligation to Implement the Covenant in Domestic Law', in Henkin (ed.), *The International Bill of Rights* (1981), pp. 311-31, 493-6.

<sup>336</sup> On 20 July 1984 the incoming Prime Minister, Mr D. R. Lange, announced that the new Labour Government would not allow sports teams from South Africa to compete in New Zealand. He added that New Zealand sportspersons would be discouraged from visiting South Africa although passports would not be withheld: *New Zealand Herald*, 21 July 1984, section 1, p. 1. Later, in a television interview, Mr Lange elaborated that entry permits would not be granted to South African sportspersons unless it was clear that they were not representing South Africa or holding themselves out as representing South Africa. A declaration in writing to that effect is now required to be made by both the South African sportsperson and the relevant sporting body.

It should be noted, however, that the issue is still regarded in New Zealand primarily as a party political issue rather than as one of legal obligation.

# WHAT IS A MILITARY OCCUPATION?\*

By ADAM ROBERTS<sup>1</sup>

## I. INTRODUCTION

ALTHOUGH there is a substantial body of international law which relates to military occupation, the scope of application of this law has been perennially problematical. The foreign military involvements of States, not least in the post-1945 world, have taken place in a bewildering variety of circumstances, and have assumed an equally bewildering variety of forms. Many recent and contemporary cases—in eastern Europe, the Middle East, Namibia, northern Cyprus, the Western Sahara, East Timor, Kampuchea and Afghanistan—raise a difficult question: what exactly is a military occupation? Underlying this question are several others: are certain types of occupation, which differ in some respect from what was envisaged in the 1907 Hague Regulations or the 1949 Geneva Conventions, still subject to the rules laid down in these and other agreements? Who determines whether a particular situation is to be called an occupation? Can the relevant body of law be applicable even in situations where the term ‘occupation’, with all its emotional overtones, is rejected by one or another party? Is there one law of military occupation, or is there a combination of rules which may vary somewhat depending on the type of occupation?

Michel Veuthey has gone so far as to say that ‘the concept of “occupation” is juridically inoperative or disputed in practically all contemporary conflicts, including those involving guerrilla warfare.’<sup>2</sup> These are sobering words, and they raise doubts as to whether there is much merit in trying to define exactly what an occupation is, when one knows that in practice States will often disagree about the application of this label to particular situations. Might it not be more useful, as Veuthey suggests, to think rather in terms of basic humanitarian rules which apply to all situations, irrespective of arid academic distinctions and definitions?

Certainly there is no use worrying excessively about the definition of occupation. The core meaning of the term is obvious enough; but, as usually happens with abstract concepts, its frontiers are less clear. There sometimes is genuine difficulty in determining such questions as when an

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<sup>2</sup> Veuthey, *Guérilla et droit humanitaire* (2nd edn., 1983), p. 355.

occupation can be said to have ended; and whether a particular situation—say the role of United States and regional forces in Grenada in late 1983—counts as an occupation.

A basic rule to follow when threading one's way through such questions is not to get into definitional and legalistic quibbling if one can avoid it. This rule is increasingly accepted in matters relating to the scope of application of the humanitarian laws of war, especially so far as the definition of 'war' is concerned. Questions such as what exactly a war is, how it is declared, how many types exist, etc., while interesting from many viewpoints, are not of enormous significance so far as the basic issue of the applicability of this body of law is concerned: it has come to be widely accepted that when there is an actual armed conflict between two or more countries, the humanitarian laws of war are applicable.<sup>3</sup> Similarly with occupations, the fact that these can be hard to define, can sometimes happen without being declared, and can have many different causes, characters and consequences, need not necessarily have an effect on the applicability of the relevant parts of the humanitarian laws of war. One might hazard as a fair rule of thumb that every time the armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable.

The case for such an approach is especially strong in view of the fact that the law on occupations is not a totally discrete entity, different from all other law and applying solely and exclusively to military occupations. On the contrary: (a) many laws of war rules which apply in occupations also explicitly apply in other situations—for example, in combat areas, or in the territory of a party to the conflict;<sup>4</sup> (b) the category of 'crimes against humanity' applies even more broadly, and depends neither on distinctions between 'war' and 'peace', nor on distinctions between what a State can do in its territory and what it can do in foreign or occupied lands;<sup>5</sup> and (c) international conventions on human rights contain some provisions which are not subject to derogation in time of emergency, and are applicable in time of war and occupation.<sup>6</sup>

<sup>3</sup> Stone, *Legal Controls of International Conflict* (1954), pp. 311–13; Draper, *The Red Cross Conventions* (1958), pp. 10–11; Brownlie, *International Law and the Use of Force by States* (1963), pp. 398–401; Skubiszewski in Sørensen (ed.), *Manual of Public International Law* (1968), pp. 808–11; Partsch in Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 3 (1982), pp. 25–8.

<sup>4</sup> Perhaps the clearest example of rules of this kind is Articles 13 to 34 of 1949 Geneva Convention IV.

<sup>5</sup> As far as conventions are concerned, the 1948 United Nations Genocide Convention is the main instrument in this area. Article I confirms that genocide 'whether committed in time of peace or in time of war' is a crime under international law.

<sup>6</sup> Non-derogable provisions include the 1950 European Convention on Human Rights, Articles 2, 3, 4 (1) and 7; and the 1966 International Covenant on Civil and Political Rights, Articles 6, 7, 8 (1) and (2), 11, 15, 16 and 18. On human rights in armed conflicts and occupations see also Draper, 'The Status of Combatants and the Question of Guerrilla Warfare', this *Year Book*, 45 (1971), p. 218; Meron, 'Applicability of Multilateral Conventions to Occupied Territories', *American Journal of International*

Even if States dispute the formal applicability of the law on occupations in a particular situation, or challenge the labelling of a military intervention as 'occupation', they still sometimes decide to apply the provisions of the law on occupations—for example, on a *de facto* or *ex gratia* basis, as the most appropriate available outline of the rights and duties of the respective parties to use in the circumstances. Courts, too, have sometimes been guided by aspects of the laws of war, including the law on occupations, even in cases where the *de jure* applicability of the relevant convention was in doubt. International organizations too have sometimes taken a similar line.<sup>7</sup>

This article does not seek to attach any exaggerated importance to the question of how military occupations are either defined or classified. The application of quite basic practical and humanitarian rules cannot be made to depend on an endless series of definitional wrangles and legal niceties. Rather the aim here is to focus attention on a process whereby the law on occupations has come to be regarded as applicable in a wide variety of situations; and also, at the same time, to get away from the *idée fixe* that all occupations are essentially the same in their character and purpose. Even if the application of a single set of rules to a very wide variety of situations presents some difficulties, it is not necessarily absurd or impossible.

## II. INDICATIONS IN THE CONVENTIONS

The various international conventions on the laws of war contain at least a framework of ideas as to what an occupation is. The most important indications are those in the Hague Regulations, in the 1949 Geneva Conventions and in the 1977 Geneva Protocol I.

### (a) *The 1907 Hague Regulations*

The 1907 Hague Regulations, like those of 1899, appear to be based on an assumption that a military occupation occurs in the context of a war, and consists of direct control of one hostile State's territory by a rival hostile State's armed forces. Some of this is evident from the very title of the part of the Regulations which deals with the question of occupation: 'Military Authority Over the Territory of the Hostile State'. The first article in this part of the Regulations—Article 42—establishes an apparently simple factual basis for determining what an occupation is:

Territory is considered occupied when it is actually placed under the authority of the hostile army.

*Law*, 72 (1978), pp. 542–57; and the same author's contributions in *Israel Yearbook on Human Rights*, issues for 1978 and 1979.

<sup>7</sup> Examples of such *de facto* applications of the law on occupations are mentioned below, pp. 268, 281–3 and 302–3.

The occupation extends only to the territory where such authority has been established and can be exercised.<sup>8</sup>

The implicit assumption here, that an occupant exercises authority directly, through its armed forces, rather than indirectly, through local agents, is also evident in Article 43, which begins: 'The authority of the legitimate power having in fact passed into the hands of the occupant. . . .' Direct control by the occupant also seems to be taken for granted in Articles 48, 49, 51-3 and 55. An open and identifiable command structure is thus a central feature of the Hague definition of military occupation.

### (b) *The 1949 Geneva Conventions*

After the Second World War, the need was felt for a more adequate definition of the cases to which the laws of war, including the law on occupations, applied. As far as occupations were concerned, there had been many, especially in the period 1938-45, which differed in important respects from the implicit definitions of the Hague Regulations. Czechoslovakia and Denmark were leading examples. These occupations did not begin with war between the parties as envisaged at The Hague. Czechoslovakia had been invaded and occupied without military resistance and before the outbreak of the war, not as a consequence of war; and Denmark, which was invaded and occupied during the war, only put up minimum military resistance to the invasion. The forms of administration also differed from what was envisaged at The Hague. In both countries there were periods when the Germans exercised control partly through indigenous governments. Moreover, in Czechoslovakia there were additional complications, not least its purported abolition as a State in March 1939. A clarification was needed that the laws of war applied to these and other types of occupation.

The main result was the adoption of common Article 2 of the four 1949 Geneva Conventions. This states, in full:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their

<sup>8</sup> Hague Convention IV Respecting the Laws and Customs of War on Land, signed on 18 October 1907, Annex, Article 42: Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (3rd edn., 1918), p. 100.

mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.<sup>9</sup>

The crucial first two paragraphs of the above article were the subject of surprisingly little discussion at the Diplomatic Conference.<sup>10</sup> This suggests that there was general agreement with their provisions, but it makes commentary difficult. However, two points about the first paragraph of the article should be briefly noted. First, the essential meaning of the paragraph is that declarations of war are of no real significance so far as the application of the laws of war is concerned. Technically speaking, the paragraph might be taken to mean that the Conventions are inapplicable in an armed conflict in which *both* parties denied the existence of a state of war, but any such interpretation of the paragraph is challenged by Pictet.<sup>11</sup> Draper is right to have said that the 1949 Conventions 'have reduced the importance of determining whether a legal state of war exists to vanishing point'.<sup>12</sup> Although the word 'occupation' only occurs in the second paragraph, it has been persuasively argued that the Conventions apply to most occupations by virtue of the first paragraph: only those types of occupation which are not opposed militarily (e.g. Czechoslovakia in 1938-9 and Denmark in 1940) are the subject of the second paragraph.<sup>13</sup>

The broad terms of common Article 2 establish that the 1949 Geneva Conventions apply to a wide range of international armed conflicts and occupations—including occupations in time of so-called peace. But they do not thereby end all possibility of dispute about what military occupation is or to what situations the law on occupations is applicable.

In the 1949 Geneva Convention IV (the Civilians Convention), many other provisions besides Article 2 indicate that occupation is conceived of more broadly than in the Hague Regulations. The most notable such provisions are Article 6, which refers to occupations which continue after the end of military operations; and Article 47, which *inter alia* takes account of two possibilities, the first being an occupation in which the authorities of the occupied territory remain in post, and the second being an attempted annexation by the occupant of the whole or part of the occupied territory.

Since 1949 the various new international conventions with a specific

<sup>9</sup> The four Geneva Conventions on the protection of victims of war, signed at Geneva on 12 August 1949, common Article 2: *United Nations Treaty Series*, vol. 75, pp. 31-417.

<sup>10</sup> For evidence of the paucity of discussion of Article 2, paras. 1 and 2, see *Final Record 1949* (n.d.), vol. IIA, p. 620; and vol. IIB, pp. 9-10, 128, 325.

<sup>11</sup> Pictet, *Commentary on Geneva Convention IV* (1958), p. 21.

<sup>12</sup> Draper, *op. cit.* above (p. 250 n. 3), at p. 25.

<sup>13</sup> Para. 2 'does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities or since the time war was declared. The paragraph only refers to cases where the occupation has taken place without a declaration of war and without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances': Pictet, *op. cit.* above (n. 11), at p. 21.

bearing on occupations have all echoed the terms of 1949 common Article 2.<sup>14</sup>

(c) *The 1977 Geneva Protocol I*

The most significant post-1949 development, so far as the scope of application of the law on occupations is concerned, is in the 1977 Geneva Protocol I, Article 1, paragraphs 3 and 4:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>15</sup>

The aim of paragraph 4 as quoted above seems to be to try to establish that certain armed conflicts, which might be viewed by some as essentially internal in character, are really international, and hence fully subject to the better developed legal regime governing international armed conflicts. As far as its specific reference to occupation is concerned, the paragraph does not concern itself directly with the definition or scope of 'alien occupation'; and it adds little to the scope of application as spelt out in the 1949 Geneva Conventions themselves. All it really does is to close a tiny technical loophole in common Article 2 of the 1949 Geneva Conventions, by making a little clearer what was already widely accepted—namely, that the law on occupations is applicable even in situations (like the West Bank and Gaza) where the occupied territory was not universally viewed as having been part of 'the territory of a High Contracting Party'. As Bothe, Partsch and Solf say, it appears that the term 'alien occupation' is 'meant to cover cases in which a High Contracting Party occupies territories of a State which is not a HCP, or territories with a controversial international status, and to establish that the population of such territory is fighting against the occupant in the exercise of their right of self-determination.'<sup>16</sup>

Another provision of the 1977 Geneva Protocol I—namely, Article 4—points in the same direction. It contains the statement: 'Neither the

<sup>14</sup> 1954 Hague Cultural Property Convention, Articles 5 and 18; 1977 Geneva Protocol I, Article 1; 1981 United Nations Convention on Certain Inhumane Weapons, Article 1. Texts in Roberts and Guelff (eds.), *Documents on the Laws of War* (1982), pp. 339, 387, 467.

<sup>15</sup> Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, signed at Geneva on 12 December 1977: Misc. No. 19 (1977) (Cmnd. 6927), p. 23.

<sup>16</sup> Bothe, Partsch and Solf, *New Rules for Victims of Armed Conflicts* (1982), pp. 51–2, support the view that this might mean in practice 'the peoples of southern Africa and Palestine'.

occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.' Thus the controversial international status of a territory would not be affected by the application of these accords: there would be no implication that it was 'the territory of a High Contracting Party'.

(d) *Other Conventions, etc.*

Other conventions and declarations, outside the laws of war framework, do not add any further general indications as to what an occupation is. Take, for example, various United Nations agreements. The United Nations Charter itself does not contain the word 'occupation'. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations does refer to occupation of 'the territory of a State' but says little.<sup>17</sup> The same is true of the 1970 Declaration on the Strengthening of International Security<sup>18</sup> and the 1974 Definition of Aggression.<sup>19</sup> However, in an *ad hoc* manner various United Nations resolutions dealing with particular territories (and mentioned later in this article) do provide some additional clues about the factual situations and types of status of territory which the term occupation can cover.

(e) *Occupation Essentially International in Character*

Taking the conventions as a whole, it is evident that the concept of military occupation remains essentially international in character. At the heart of almost all treaty provisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of coercive control or authority over inhabited territory outside the accepted international frontiers of their State. However, the conventions are far from clear that the law applies to all possible situations of this type; moreover, they give rather few hints about its possible relevance in any analogous situations which may arise within a State. It will be necessary to turn to other sources, including State practice and judicial decisions, to illuminate these issues.

### III. BEGINNING AND END OF OCCUPATION

To the extent that there are clearly established factual criteria for determining when occupations begin and when they end, the question of what an occupation is becomes easier to answer. However, while the conventions as cited above do indicate certain criteria, these do not cover all cases.

<sup>17</sup> Approved on 24 October 1970 in GA Res. 2625 (XXV).

<sup>18</sup> Approved on 16 December 1970 as GA Res. 2734 (XXV).

<sup>19</sup> Approved on 14 December 1974 in GA Res. 3314 (XXIX).

(a) *The Beginning of Occupation*

In the great majority of cases, occupations are preceded by invasions. The rather technical issue of the precise moment when an invasion turns into an occupation is not always easy to determine. Invasion itself—the entry of military forces into country controlled by adversaries—is not occupation; and if it consists of a mere raid, or a simple passage across territory, it may not lead to occupation. Most sources follow the Hague Regulations, Article 42, in stating that occupation may be said to begin when the invader actually exercises authority, thus stressing that it is factual criteria that are important.<sup>20</sup>

Even before an occupation begins, relations between the invaders and the inhabitants are subject to numerous provisions of the laws of war, including many of those set out in the 1899 and 1907 Hague Regulations, and in the 1949 Geneva Convention IV. All that happens when an occupation begins is that in addition to the general provisions of the laws of war, the specific provisions relating to occupied territories (which constitute Section III both in the Hague Regulations and in the 1949 Geneva Convention IV) come fully into effect.

Pictet suggests that the Geneva rules governing occupations also apply in the preceding invasion phase:

There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49, which prohibits the deportation or forcible transfer of persons from occupied territory . . .<sup>21</sup>

Both the United States and United Kingdom military manuals take a similar view, stating that the rules which apply to occupied territory should also be observed as far as possible in areas through which troops are passing and even on the battlefield.<sup>22</sup> All this is evidence of a more general tendency to think of the laws of war as a set of minimum rules to be observed in the widest possible range of situations, and not to worry excessively about the precise legal definition of military occupation. Further evidence of such an approach is to be found in the 1977 Geneva Protocol I, in which most provisions apply quite generally, and only a few are said to apply specifically to occupied areas.<sup>23</sup>

<sup>20</sup> Oppenheim, *International Law*, vol. 2 (7th edn., 1952), pp. 434–6; US, Department of the Army, *The Law of Land Warfare*, Field Manual No. 27–10 (18 July 1956), pp. 138–9; UK, War Office, *Manual of Military Law*, Part III, *The Law of War on Land* (1958), pp. 141–2.

<sup>21</sup> Pictet, *op. cit.* above (p. 253 n. 11), at p. 60.

<sup>22</sup> US Manual, *op. cit.* above (n. 20), at p. 138; UK Manual, *op. cit.* above (n. 20), at p. 141.

<sup>23</sup> In 1977 Geneva Protocol I, Articles 14, 63 and 69 (dealing respectively with medical units, civil defence, and basic needs) are the main provisions whose application is specifically in occupied areas.

Making a proclamation of occupation, like making a declaration of war, may be considered the proper thing to do, but it is not absolutely essential. There is no formal requirement—in the Hague, Geneva or any other conventions in force—that the occupying forces have to issue a formal proclamation of a state of occupation. However, such proclamations are generally considered to be desirable, and are favoured by international practice.<sup>24</sup>

In some instances there may be occupations which do not begin with invasion. Foreign forces may be stationed in a territory by international agreement (with peacekeeping, defence or other specified functions), and then later go beyond that role. For example, from 1920 onwards South Africa's presence in Namibia was under the terms of an international mandate, terminated by the United Nations in 1966. Thereafter, and especially after the advisory opinion of the International Court of Justice in 1971, it was increasingly viewed as an occupation. This and some other possible examples of occupation beginning otherwise than by outright invasion are considered later in this article.

### (b) *The Ending of Occupation*

Most legal writings indicate that an occupation ends when the troops leave. As Oppenheim put it, 'Occupation comes to an end when an occupant withdraws from a territory, or is driven out of it'.<sup>25</sup> In many cases such a statement poses no problems. But the occupant has not necessarily withdrawn at the end of all occupations, especially of the post-surrender type, a category to which, in any case, the application of the law on occupations has in the past often been contested.<sup>26</sup>

#### 1. *Military withdrawal*

One post-war example of an occupation which did end with a complete withdrawal of all the occupying forces (in this case by agreement) is Austria. The occupation by the USSR, USA, UK and France, which lasted for more than ten years, was wound up in accord with the Austrian State Treaty, signed by these four countries on 15 May 1955. Later the same day the Austrian foreign ministry published the text of a resolution on Austria's permanent neutrality to be placed before the national legislature. The last Allied troops left Austria on 24 October 1955, and on 25 October Austria became a completely free and sovereign country.<sup>27</sup>

This date of the formal ending of the occupation is not necessarily the same as the date of re-emergence of the Austrian State. Clute has persuasively argued that 28 June 1946—the date of a new agreement

<sup>24</sup> US Manual, op. cit. above (p. 256 n. 20), at p. 140; UK Manual, op. cit. above (p. 256 n. 20), at p. 142.

<sup>25</sup> Oppenheim, op. cit. above (p. 256 n. 20), at p. 436.

<sup>26</sup> On post-surrender occupations, see below, pp. 267–71.

<sup>27</sup> *Keesing's Contemporary Archives*, pp. 14193–8 and 14561.

concluded by the four occupying powers—can be interpreted as the real date of ‘the re-emergence of the Austrian State and a government capable of acting on its behalf . . .’. The 1955 Austrian State Treaty ‘merely confirmed the existence of an independent Austrian State and contributed to its stability by creating the conditions for a termination of the occupation, but did not create or re-establish the Austrian State’.<sup>28</sup>

Another example of an occupation ending with a negotiated withdrawal by the occupying forces was the Israeli occupation of Sinai which had begun in 1967, and which was concluded with a phased evacuation between 1979 and 1982 in accord with the terms of the Egypt–Israel Peace Treaty signed in Washington in March 1979.<sup>29</sup>

## 2. *Continued presence of foreign forces*

However, there are instances where an occupation is declared or widely presumed to have ended, but the occupant’s forces remain in the country. This can happen, for example, if a treaty ending an occupation is accompanied by another one permitting the presence of foreign forces. Alternatively it may happen in a less formal way.

In Japan on 28 April 1952 a Peace Treaty ending the United States military occupation of the country took effect, and simultaneously a Security Treaty came into force, providing for a continued United States military presence.<sup>30</sup>

Likewise in West Germany on 5 May 1955 a number of agreements took effect simultaneously, including one which ended the last vestiges of the three-power occupation, one which provided for the continued presence of the same three countries’ forces in West Germany, and others which provided for the entry of West Germany into the North Atlantic Treaty Organization and the Western European Union.<sup>31</sup>

As for East Germany, a Soviet Government statement of 25 March 1954 ended the Soviet ‘supervision of the activities of the German Democratic Republic’, and also specified that the Soviet Union would retain in East Germany its functions connected with guaranteeing security.<sup>32</sup>

The city of Berlin meanwhile remains frozen in the time-warp of the four-power occupation. Although the powers of the Allies are minimal

<sup>28</sup> Clute, *The International Legal Status of Austria 1938–1955* (1962), pp. 34–5, 132.

<sup>29</sup> For details of the evacuation see International Institute for Strategic Studies, *Strategic Survey* 1979 (1980), pp. 73–8, and *Strategic Survey* 1982–1983 (1983), pp. 69–70.

<sup>30</sup> For texts of these two treaties, both of which had been signed on 8 September 1951, see *United Nations Treaty Series*, vol. 136, pp. 46, 216.

<sup>31</sup> For details of the agreements on West Germany see B. Ruhm von Oppen, *Documents on Germany under Occupation 1945–1954* (1955), pp. 600–48. Most of the occupants’ powers of intervention in West German domestic affairs had already been abolished in the Convention on Relations Between the Three Western Powers and the Federal Republic, signed on 26 May 1952. Text in *ibid.*, pp. 616–17.

<sup>32</sup> *Ibid.*, pp. 597–8. In 1955 several further steps were taken, including the opening of diplomatic relations between the USSR and GDR on 20 September. However, West German official publications continued for many years thereafter to refer to East Germany as the ‘Soviet Occupation Zone’.

and residual, Berlin is a reminder that occupations can assume some very strange forms, and can last for an astonishingly long time.<sup>33</sup>

In some instances, there may have been no formal statement that an occupation has ended, and no withdrawal of the occupying troops, yet the territory ceases to be viewed as occupied. The situation in Hungary after the Soviet suppression of the 1956 Hungarian uprising affords a possible example. A United Nations General Assembly resolution in November 1956 referred to 'the Soviet army of occupation in Hungary'; and a resolution in 1957 said 'the USSR has violated its obligations under the Geneva Conventions of 1949'.<sup>34</sup> However, as events moved on and Kadar consolidated his leadership, there were no more designations of Hungary as an occupied territory, despite the continued presence of Soviet forces.

The possibility that an occupation might gradually fade away was allowed for in 1949 Geneva Convention IV, Article 6, which specified that in occupied territory the Convention shall cease to apply one year after the general close of military operations, but that 'the Occupying Power shall be bound, for the duration of the occupation, to the extent that such power exercises the functions of government in such territory, by the provisions of the following Articles . . .', which are then enumerated. The current status of this provision is discussed later in this article.<sup>35</sup>

### 3. *Other types of ending*

An occupation can also end without a departure of troops if there is a legitimate transfer of sovereignty. The treaty transfer of territory from Turkey to Greece after the Balkan Wars of 1912–13 is an example. The Permanent Court of International Justice's award in the *Lighthouses* case in 1934 was based on a distinction between the period when Greece was occupant, and later sovereign, of the Ottoman territories concerned.<sup>36</sup>

There have been instances in which some have ceased to view a territory as occupied, not because the situation has stabilized, but rather because resistance has become so widespread that the invader, although he has not withdrawn, is presumed to have lost capacity to exercise authority. This

<sup>33</sup> The legal status of Berlin is the subject of the four-power agreement of 3 September 1971, but this nowhere mentions the word 'occupation', nor indeed the word 'Berlin'. For one earlier assessment of the legal status of Berlin see the chapter by Bishop in Stanger (ed.), *West Berlin: The Legal Context* (1966).

<sup>34</sup> GA Resolutions 1127 (XI) of 21 November 1956, and 1133 (XI) of 14 September 1957. On 27 May 1957 Hungary and the USSR signed a troop-stationing agreement: see below, p. 288.

<sup>35</sup> On occupations one year after the end of military operations see below, pp. 271–3.

<sup>36</sup> *PCIJ, Series A/B*, vol. 62, pp. 4–29. The territories in question had been transferred from Turkey to Greece under the terms of the unratified Treaty of London of 30 May 1913 (Parry, *The Consolidated Treaty Series*, vol. 218, p. 159); the Treaty of Athens of 14 November 1913 (*ibid.*, vol. 219, p. 21); and the Treaty of Lausanne of 24 July 1923 (*League of Nations Treaty Series*, vol. 28, p. 12). On the eventual settlement of the dispute over the lighthouses see the Permanent Court of Arbitration's decision of 24 July 1956 in the *Lighthouses* arbitration between France and Greece (23 ILR 659–81). Another case relating to Greece's acquisitions of territory in the period of the breakup of the Ottoman Empire, and similarly depending on a distinction between a period of occupation and subsequent transfer of sovereignty, was the *Ottoman Debt* arbitration: see below, p. 266 n. 58.

was a significant issue in a number of trials following the Second World War, affecting as it did the question whether the relevant body of law was that which relates to combat or that which relates to military occupations. Different decisions on the matter were reached in different cases, reflecting at least in part the different factual circumstances and issues involved.<sup>37</sup>

The preceding brief survey of the beginning and ending of occupations has suggested that the question of when an occupation can be said to have begun, or ended, is sometimes easy to answer but is by no means always so. Even when it can be answered with confidence, there may still be many gradations between direct foreign military control on the one hand and complete independence and freedom from foreign military forces on the other.

#### IV. DIFFERENT TYPES OF MILITARY OCCUPATION

The genus 'military occupation' can be classified in many different ways, depending on the particular purpose for which the classification is made. The principal concern here being the applicability or otherwise of the law on occupations, the types or categories of occupation which appear on the following table are ones which raise different issues as to the applicability of such provisions as those contained in the 1907 Hague Regulations and the 1949 Geneva Convention IV. The question arises as to whether any of these types of occupation is subject in any way to a different international legal regime.

These types or categories of occupation are not mutually exclusive: a given occupation might well fit into two or more of the categories at the same time, and/or at different times. For example, the Allied occupation of the Rhineland at the end of the First World War was a multilateral occupation; and it could additionally in successive periods be fitted into three other categories (first belligerent, then armistice, then peacetime occupation by consent)—a reminder of the artificiality of these categories.

The list is neither exhaustive nor definitive: authorities are not agreed on the exact terms to be applied, and it represents just one attempt at distillation and improvisation. Each type of occupation listed is discussed separately under the relevant heading below.

<sup>37</sup> See, e.g., two cases before the United States Military Tribunals at Nuremberg. In the *Hostages* case (*USA v. Wilhelm List et al.*), United States Military Tribunal V ruled on 19 February 1948 that the German armed forces were able to maintain control of Greece and Yugoslavia until they evacuated them in 1944: *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. 11 (1950), pp. 1243–4. In the *Einsatzgruppen* case (*USA v. Otto Ohlendorf et al.*), United States Military Tribunal II ruled on 8–9 April 1948 that in parts of the Soviet Union occupied by Nazi Germany 'the so-called partisans had wrested considerable territory from the German occupant, and . . . military combat of some dimensions was required to reoccupy those areas . . . In reconquering enemy territory which the occupant has lost to the enemy, he is not carrying out a police performance but a regular act of war . . .': *ibid.*, vol. 4 (1950), pp. 492–3. See also the substantial discussion of this issue as it had arisen in the post-war French case of *In re Bauer and Others*: United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* (1947–9), vol. 8, pp. 18–19.

*Seventeen Types of Occupations*

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*(a) Wartime and Post-War*

The following types of occupation occur during or directly after wars. The word 'war' is used in a factual sense here, to refer to significant (and in this case international) armed conflict.

*1. Belligerent occupation*

This is the classic type of military occupation. It is sometimes known as *occupatio bellica*,<sup>38</sup> and is more or less synonymous with another commonly used term, 'occupation of enemy territory'. When the term 'belligerent occupation' is used in its strict sense, its key distinguishing characteristics are that it is (a) by a belligerent State, (b) of territory of an enemy belligerent State, (c) during the course of an armed conflict, and (d) before any general armistice agreement is concluded.<sup>39</sup> However, the term

<sup>38</sup> In past centuries, the term *occupatio bellica* sometimes carried a more extreme meaning, even implying full acquisition of sovereignty by the occupant.

<sup>39</sup> The definition is adapted from those offered or implied by Graber, *The Development of the Law of Belligerent Occupation 1863-1914* (1949), p. 5; Feilchenfeld, *The International Economic Law of Belligerent Occupation* (1942), p. 6; von Glahn, *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation* (1957), p. 28.

is often used more broadly to cover wartime occupations of neutral territory; occupations following armistice agreements; and even occupations after the end of active hostilities.

Belligerent occupation in the strict sense is the type which is most unambiguously subject to the law on occupations. Although the term itself does not appear in any of the relevant conventions, it was with this type of occupation above all in mind that these conventions were drawn up. And it is also probably the type of military occupation which has occurred most frequently in this century.

So central has belligerent occupation been to the development of the law on occupations that it is often called the 'law of belligerent occupation'; and it is often suggested that belligerent occupation is the only type to which the law on occupations is applicable. Thus Freeman wrote in 1946: 'International law knows only two categories of occupation by a conquering State: belligerent occupation properly so-called and assumption of sovereignty over the conquered areas. There is no in-between status.'<sup>40</sup> Von Glahn has likewise written: 'Conventional international law recognizes only one form of military occupation: belligerent occupation, that is, the occupation of part or all of an enemy's territory in time of war; this is the type of occupation covered by the Hague Regulations and the Fourth Geneva Convention of 1949.'<sup>41</sup>

However, there are some kinds of occupation which are not exactly 'belligerent occupations' as that term is usually understood, and to which, nevertheless, the law on occupations is applicable. Especially since the advent of the 1949 Geneva Conventions, common Article 2, the body of law governing occupations has recognized this fact. Therefore in this study the practice of using 'belligerent occupation' as the legally relevant generic term is not followed. Instead this article adopts the position of those writers who have used 'military occupation' or just 'occupation' as the best generic term.<sup>42</sup>

## 2. *Occupation of neutral territory*

This is the occupation by a belligerent of all or part of the territory of a State which has been neutral in a particular armed conflict. Usually this is but one form of belligerent occupation, because such States normally cease to be neutral at the moment when they are attacked and resist such attack. As Oppenheim has said:

<sup>40</sup> *American Journal of International Law*, 40 (1946), pp. 796-7.

<sup>41</sup> Von Glahn, *op. cit.* above (p. 261 n. 39), at p. 27. However, this restrictive view is not evident on p. 20 (where he quotes 1949 Geneva Convention IV, Article 2); p. 273; and p. 281, where the Convention's application to post-surrender occupations is well discussed.

<sup>42</sup> Such writers include Spaight, *War Rights on Land* (1911); Hall, *Treatise on International Law* (8th edn., 1924); Fraenkel, *Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918-1923* (1944); US Manual, *op. cit.* above (p. 256 n. 20); and Greenspan, *The Modern Law of Land Warfare* (1959).

Hostilities against a neutral on the part of either belligerent are acts of war, and not mere violations of neutrality. Thus the German attack on Belgium in 1914, to enable German troops to march through Belgian territory and attack France, created war between Germany and Belgium.<sup>43</sup>

In minor instances—for example, when a neutral State wards off a frontier incursion—such a transformation of neutrality into belligerency cannot in every case be taken for granted.<sup>44</sup>

The Hague Regulations are generally accepted as applying to occupations of neutral territory. As Feilchenfeld said in 1942:

Section III of the Hague Regulations applies expressly only to territory which belongs to an enemy and has been occupied without the consent of the sovereign. It is, nevertheless, usually held that the rules on belligerent occupation will also apply where a belligerent, in the course of the war, occupies neutral territory, even if the neutral power should have failed to protest against the occupation.<sup>45</sup>

The applicability of the Hague Regulations to the Axis occupations of neutral States in the Second World War was accepted in principle by both prosecution and defence at the International Military Tribunal at Nuremberg, and at other post-war trials where the issue arose.

The 1949 Geneva Conventions, in accord with the broad terms of common Article 2, quite clearly apply to occupations of neutral territory.

### 3. *Occupation of allied territory*

This can occur in a number of circumstances. Its usual form is the recapture of all or part of the territory of an ally from an enemy who has been a belligerent occupant of the territory in question. Such an occupation may be of short duration, pending the return of the legitimate sovereign or the establishment of an indigenous government and administration. In most cases it is likely to be governed by some prior agreement between the occupying power and the government of the occupied State, thus falling into the category of occupation by consent: any such occupation has a special legal character, not only because of its separate legal basis (the particular agreement), but also because the indigenous authorities may be entrusted with wider powers than in a belligerent occupation.

Is the law on occupations applicable in such cases? There has been little writing about this, partly no doubt because relatively fewer problems are anticipated than in other types of occupation. In the writing that exists, broadly similar views are expressed as to the applicability of the law on

<sup>43</sup> Oppenheim, *op. cit.* above (p. 256 n. 20), at p. 685.

<sup>44</sup> 'The fact of a neutral Power resisting, even by force, attempts to violate its neutrality can not be regarded as a hostile act': 1907 Hague Convention V on Neutrality in Land War, Article 10.

<sup>45</sup> Feilchenfeld, *op. cit.* above (p. 261 n. 39), at p. 8. Von Glahn takes a similar view in *op. cit.* above (p. 261 n. 39), at p. 12. Oppenheim, *op. cit.* above (p. 256 n. 20), at p. 241, states that in certain circumstances an occupant of neutral territory 'does not possess such a wide range of rights with regard to the occupied country and its inhabitants as he possesses in occupied *enemy* territory'.

occupations. Von Glahn has said: 'Unless regulated in advance by treaty with the government involved, the occupant would appear to be bound by the provisions of the Hague Regulations and subsequent international lawmaking treaties.'<sup>46</sup> He does not specify what the continuing role of the Hague Regulations, etc., might be in the event that there is such an agreement or treaty with the government concerned. The British military manual is sceptical about the applicability of the law on occupations to occupations of allied territory, except in those cases where it is not possible to conclude a 'civil affairs' agreement before liberation of that territory: in such cases the law on occupations ought to apply as a minimum standard.<sup>47</sup> Greenspan takes much the same line.<sup>48</sup>

In practice, most occupations of allied territory have been governed by what have come to be known as civil affairs agreements, and not explicitly by the law on occupations, though the former often reflect the language and concepts of the latter. Towards the end of the Second World War the Allies made agreements for strictly temporary military authority over civil administration in France, Belgium, Luxembourg, the Netherlands, Norway, Denmark, French Indo-China and the Netherlands East Indies.<sup>49</sup> As Donnison has said apropos of these occupations:

In the case of forces operating in friendly territory the legal position is not so clear. There is a conflict between two principles, the one, the continuance or the revival, if the territory has been recovered from enemy occupation, of the sovereignty of the friendly government concerned, the other, the principle of military necessity under which the military commander is entitled to take any measures necessary to the success of his operations. There is not the same body of international law and usage to regulate such a situation as there is in the case of operations in enemy territory.<sup>50</sup>

Much the same view—that in an occupation of allied territory the Hague Regulations are not applicable—was advanced in several Polish judgments after the Second World War so far as the activities of Soviet forces on Polish territory were concerned.<sup>51</sup>

However, in at least one post-war occupation of what was technically allied territory the laws of war appear to have been viewed as applicable. This was in Java, a part of the Netherlands East Indies occupied by Japan in the Second World War and then liberated by the Allies in September 1945 after Japan's surrender. The situation in Java was complicated by the fact that there was tension between local political forces seeking

<sup>46</sup> Von Glahn, *op. cit.* above (p. 261 n. 39), at p. 27.

<sup>47</sup> UK Manual, *op. cit.* above (p. 256 n. 20), at pp. 140–1 n. See also US Manual, *op. cit.* above (p. 256 n. 20), at p. 139.

<sup>48</sup> Greenspan, *op. cit.* above (p. 262 n. 42), at pp. 211–12, 235–40.

<sup>49</sup> Donnison, *Civil Affairs and Military Government: Central Organisation and Planning* (1966), pp. 121–3. He points out that in the cases of Denmark, France and French Indo-China, agreements were only concluded after the arrival of the Allied forces.

<sup>50</sup> *Id.*, *Civil Affairs and Military Government: North-West Europe 1944–46* (1961), p. 37.

<sup>51</sup> See esp. *Jakub L. v. Teofil B.*, a 1946 case about a cow which changed hands, 26 ILR 730.

independence, and the Allied occupants who were working in conjunction with the Netherlands, the (absent) colonial power in the area. In the case of *Public Prosecutor v. X. (Eastern Java)*, a Temporary Court Martial at Surabaya held on 9 January 1948:

The Commanders of an Allied Military Force occupying a territory which it had reconquered from the common enemy did not derive their powers to issue military Ordinances for such a territory from the ordinary laws in force there, but directly from the generally recognized principles of war according to which those who *de facto* exercise authority in such liberated countries are entitled to issue the necessary military regulations.<sup>52</sup>

There may be a case for saying that 1949 Geneva Convention IV is applicable to occupations of allied territory, as it is to the other situations covered in the broad terms of common Article 2. However, in many cases the Convention's application is likely to be restricted because of the provision in Article 4, paragraph 2, that nationals of a co-belligerent State 'shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are'. Commenting on this, Pictet says: 'It is assumed in this provision that the nationals of co-belligerent states, that is to say, of allies, do not need protection under the Convention.'<sup>53</sup>

A quite different form of occupation of allied territory is that which occurs against the will of the occupied State—for example, when the senior partner in an alliance intervenes to prevent his co-belligerent opting out of a war. Typical cases are the German Army's take-overs in northern Italy following the announcement on 8 September 1943 that the Italian Government had surrendered; and in Hungary in March 1944. It was particularly on account of the case of Italy that Article 4, paragraph 2, of 1949 Geneva Convention IV contained the above-mentioned condition that there should be normal diplomatic representation.<sup>54</sup> Where normal diplomatic relations have been broken off, the inhabitants are to be regarded as protected persons. Thus coercive occupations of the territory of co-belligerents are covered by 1949 Geneva Convention IV.

#### 4. *Armistice occupation*

This is an occupation under the terms of an armistice between belligerents. It is sometimes known as mixed occupation, or *occupatio mixta—bellica pacifica*;<sup>55</sup> and is quite widely viewed as one form of

<sup>52</sup> *Annual Digest*, 15 (1948), Case no. 176, p. 535. On the background, see Donnison, *British Military Administration in the Far East 1943-46* (1956), pp. 422-4. However, a 1945 Belgian case indicated that an allied occupying power operating under the terms of a specific agreement may have very restricted rights: below, p. 305 n. 197.

<sup>53</sup> Pictet, *op. cit.* above (p. 253 n. 11), at p. 49.

<sup>54</sup> *Ibid.*

<sup>55</sup> The term used by F. Llewellyn Jones in his paper 'Military Occupation of Alien Territory in Time of Peace', *Transactions of the Grotius Society*, 9 (1924), p. 150.

belligerent occupation.<sup>56</sup> The territory concerned may have been under belligerent occupation in the pre-armistice period; or it may be newly occupied.

An armistice can be defined as an agreement (which may be general or local) between belligerents on the suspension of hostilities. It may be of a temporary nature, like a truce or cease-fire, or it may involve a complete cessation of hostilities. The term is now most often used in the latter sense. An armistice is distinct from (though it may precede) a definite treaty of peace.<sup>57</sup>

At the end of the First World War there were many armistice occupations by forces of the Allied powers. For example, Western Thrace, which had been assigned to Bulgaria in 1913 under the terms of the 1913 Treaty of Bucharest, was occupied by the Allied Powers at the end of 1918 following the Armistice Convention of Prilep of 29 September 1918. Subsequently, in accordance with the Peace Treaty of Neuilly of 27 November 1919 (which entered into force on 9 August 1920), the territory was ceded to the Allied Powers—which meant in effect Greece.<sup>58</sup> Other examples in the same period were the occupation of part of Hungary by Serbian troops from November 1918 to August 1921; and the occupation of the left bank of the Rhine under the terms of the Armistice of 11 November 1918 until a more permanent agreement was concluded on 28 June 1919.<sup>59</sup>

During the two world wars, such armistice agreements as provided for occupations usually contained a clause stipulating that the occupant had all the rights of an occupying power, but they also provided for support and co-operation from the occupied country. As Bothe has indicated, this

<sup>56</sup> Schwarzenberger, 'The Law of Belligerent Occupation: Basic Issues', *Nordisk Tidsskrift for International Ret*, 30 (1960), p. 18.

<sup>57</sup> However, some armistices may put an end to a state of conflict or war. See McNair and Watts, *The Legal Effects of War* (4th edn., 1966), p. 15.

<sup>58</sup> The status of Western Thrace between 1918 and 1920 was one of the matters considered in the *Ottoman Debt* arbitration (1925). The Swiss arbitrator, Professor E. Borel, ruled that these were occupied territories up to 9 August 1920, and that no transfer of sovereignty took place before that date: *Reports of International Arbitral Awards*, vol. 1, pp. 554–6. Similarly in the *Thrace (Validity of Wills)* case (1925), a Greek court viewed Thrace as having been occupied (and hence Bulgarian law as having been still applicable) during the period when it was controlled by inter-allied troops, and in particular in early 1920: *Annual Digest*, 3 (1925–6), Case no. 364, p. 477.

Texts of treaties relating to Western Thrace: the 10 August 1913 Treaty of Bucharest in Parry, *The Consolidated Treaty Series*, vol. 218, p. 322; the 1918 Prilep Armistice Convention, including its four secret articles, in Falls, *Military Operations: Macedonia, from the Spring of 1917 to the End of the War* (HMSO, 1935), pp. 252–3; the 1919 Treaty of Neuilly in *American Journal of International Law*, 14 (1920), Supplement, p. 185; the 10 August 1920 Treaty of Sèvres concerning Thrace, by which the Allies ceded the territory in question to Greece, in *League of Nations Treaty Series*, vol. 28, p. 226. The main events affecting the status of Western Thrace were usefully summarized in the *Lighthouses* arbitration between France and Greece (1956): 23 ILR 659 at pp. 666–9.

<sup>59</sup> On the Serbian occupation of part of Hungary, see the case of *I. Véték v. N. Dürnbacher & Co.* in *Annual Digest*, 4 (1927–8), Case no. 386, p. 566.

On the armistice occupation of the Rhineland see the excellent discussion of legal aspects in Fraenkel, *op. cit.* above (p. 262 n. 42), at pp. 183–9. Note particularly his disquiet (p. 188) at the German view which down-played the applicability of the law of belligerent occupation. For a text of the 1918 armistice see Parry, *The Consolidated Treaty Series*, vol. 224, p. 286.

may suggest that the rights and duties of an occupying power can be determined by two different sources—the law on occupations, and the terms of the armistice. He expresses some scepticism as to whether the status of foreign forces was in fact different in each of these cases.<sup>60</sup>

Since the Second World War, the various armistice agreements which have been concluded have not specifically provided for occupations of territory, although some (for example, after the 1973 Middle East war) were followed by a continuation of an already existing occupation.<sup>61</sup>

It is widely accepted that the Hague Regulations apply to armistice occupations. Some modifications might be included in the armistice agreement, but the Hague Regulations remain important, at the very least, as a set of minimum standards.<sup>62</sup>

The 1949 Geneva Conventions are clearly applicable to armistice occupations.<sup>63</sup> They set some limits to the modifications which can be contained in any agreement (including an armistice agreement) between the parties.<sup>64</sup> However, if an armistice involved a general close of military operations, and lasted for more than one year, then under Article 6 some provisions of Convention IV could cease to apply.<sup>65</sup>

### 5. *Post-surrender occupation*

This is defined here as the occupation of a country which after taking part in an armed conflict has surrendered completely, and neither continues to maintain armed forces in the field, nor has any allies fighting to redress the situation.<sup>66</sup> It may have a less precarious and temporary character than belligerent occupation. A number of particular types of occupation can be regarded as variants of post-surrender occupation. They include *occupation subsequent to unconditional surrender*; and *post-debellatio occupation*, which can be said to occur when at the end of a war a country is so completely defeated that it has virtually ceased to exist as a State.<sup>67</sup>

<sup>60</sup> Bothe, 'Occupation after Armistice', *Encyclopaedia of Public International Law*, vol. 4 (1982), p. 63.

<sup>61</sup> *Ibid.*, pp. 63–4.

<sup>62</sup> Spaight, *op. cit.* above (p. 262 n. 42), at pp. 245–8; Feilchenfeld, *op. cit.* above (p. 261 n. 39), at pp. 6, 110–14; von Glahn, *op. cit.* above (p. 261 n. 39), at p. 28; UK Manual, *op. cit.* above (p. 256 n. 20), at p. 130.

<sup>63</sup> Under the first paragraph of common Article 2 of the 1949 Conventions: Pictet, *op. cit.* above (p. 253 n. 11), at pp. 20–2, 62, 63, etc.

<sup>64</sup> That special agreements may not undermine the principles of the 1949 Geneva Convention IV is spelt out clearly in Article 7; Article 11, para. 5; and Article 47. For an explanation of Articles 7 and 47, confirming the Convention's relevance to armistice occupations, see *ibid.*, pp. 67 and 274–5. See also Castrén, *The Present Law of War and Neutrality* (1954), p. 214.

<sup>65</sup> Pictet is explicit that Article 6 applies to armistices: *op. cit.* above (p. 253 n. 11), at p. 63. This article is discussed further below, pp. 271–3.

<sup>66</sup> Von Glahn calls this 'hostile occupation': *op. cit.* above (p. 261 n. 39), at p. 27.

<sup>67</sup> The term *debellatio*, which is the same as 'subjugation', is not always used quite consistently. Schwarzenberger points to its basic meaning when he suggests that it is the process whereby 'armed conflicts are terminated unilaterally by the destruction of a party to the conflict as an independent and organized entity': *International Law as Applied by International Courts and Tribunals*, vol. 2 (1968),

Where a State's forces surrender, but there are still allies who continue the struggle, there is an ordinary belligerent occupation, not a post-surrender occupation as discussed here.<sup>68</sup> In cases where there is an actual instrument of surrender or of capitulation, the legal framework of a post-surrender occupation is likely to be significantly influenced by its terms.<sup>69</sup>

A country's defeat and collapse does not necessarily lead to occupation; or it may lead to occupation of a rather special kind. At the end of the First World War, events at the time of the collapse of the Austro-Hungarian Empire raised the question of whether, within a disintegrating State, and before the entry into force of the various peace treaties, any new political or military entities which emerged within the former empire could be considered in any sense the occupants of the territory which they held, or could at least be subject to the application by way of analogy of the law on occupations. Some cases arising from these events indicate a tendency to view at least part of section III of the Hague Regulations as applicable to the new authorities exercising power in one part or another of the former empire. See particularly the decision in the *Danube Shipping* arbitration (1921), in which it was held that although the situation in the former territory of the Hapsburg Empire at the end of the First World War was not an occupation in the normal sense, and the letter of the Hague provisions did not apply, Articles 46 and 53 should be examined 'to see if they furnish a useful analogy'. However, in the event, the arbitrator decided that the character of the vessels concerned was such that they did not fall within the scope of these articles of the Hague Regulations.<sup>70</sup>

The Allied occupations of Germany and Japan after the Second World War provide much clearer examples of post-surrender occupations, and also of reluctance to be formally bound by the Hague Regulations. Here, as well as elsewhere, the victors desired to exercise their power freely, and in particular to make drastic political and other changes in the defeated States. The basic character of these occupations raised issues to which relatively little attention had been paid by international lawyers. Previously, it had sometimes been assumed that the normal consequence of a State's surrender was its subjugation or possibly even annexation by the

p. 730. See also pp. 63 and 320. Similarly, Alwyn V. Freeman has called it 'annihilation of the enemy's armed forces together with destruction of its government resulting in disappearance of the enemy state as an international person': *American Journal of International Law*, 40 (1946), p. 796. Pictet suggests that the absence of a treaty is a main characteristic when he defines *debellatio* as 'the end of an armed conflict which results in the occupation of the whole of the enemy's territory and the cessation of all hostilities, without a legal instrument of any kind': *op. cit.* above (p. 253 n. 11), at p. 62 n. But Baxter clearly states that a *debellatio* can take the form of a peace treaty: 'The Duty of Obedience to the Belligerent Occupant', this *Year Book*, 27 (1950), p. 236.

<sup>68</sup> Stone, *op. cit.* above (p. 250 n. 3), at p. 696.

<sup>69</sup> See, e.g., the discussion of the effects of surrender as the issue had arisen in the post-war Shanghai case *Trial of Lothar Eisentrager (alias Ludwig Ehrhardt) and Others* (1947): United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, vol. 14, pp. 18-22. See also *ibid.*, vol. 15, pp. 131-2.

<sup>70</sup> *Reports of International Arbitral Awards*, vol. 1, pp. 105, 108. See also the comparable issues raised in *Kotra and Others v. Czechoslovakia* (1934), *Annual Digest*, 7 (1933-4), Case no. 221, p. 509.

victor; but this did not happen in the bulk of German or Japanese territory at the end of the Second World War, nor in a number of other instances at that time of post-surrender occupations. What took place instead, especially in Germany and Japan, were occupations which went beyond the letter of the Hague Regulations, yet fell short of annexation or assumption of sovereignty.

With respect to the occupation of Germany which began in 1944-5, a legal memorandum to the Foreign Office in March 1945 set out the basic problem:

The truth is that the Allies are dealing with a situation without previous parallel; they are proposing to exercise their authority with respect to Germany in order to expel the Nazi system and its manifestations completely and utterly, and to continue this process indefinitely until it has succeeded. These objects, far ranging as they are, do not necessarily amount to annexation and the positive and complete transfer of sovereignty whether by cession or by conquest. But they do undoubtedly go far beyond the exercise of military occupation as limited by previous international law.<sup>71</sup>

After the Germans accepted unconditional surrender on 7 May 1945, Germany was completely occupied by the Allies. What then was the position so far as the application of the Hague Regulations was concerned?<sup>72</sup> On this point Jennings, in his authoritative 1946 article 'Government in Commission', argued persuasively that the law of belligerent occupation had been designed to serve two purposes: first, to protect the sovereign rights of the legitimate government of the occupied territory, and secondly, to protect the inhabitants of the occupied territory from being exploited for the prosecution of the occupant's war. Neither of these purposes had much bearing on the situation the Allies faced:

Thus the whole *raison d'être* of the law of belligerent occupation is absent in the circumstances of the Allied occupation of Germany, and to attempt to apply it would be a manifest anachronism.<sup>73</sup>

Friedmann adopted a very similar position:

Nor could even the widest interpretation of the rules of warfare bring the powers claimed and exercised by the allies in Germany within the scope of belligerent occupation . . . Even the most elastic interpretation could not bring the wholesale abolition of laws, the denazification procedure, the arrest of thousands of individuals, the introduction of sweeping social reforms, the expropriation of industries, and above all the sweeping changes in the territorial and constitutional

<sup>71</sup> 'Opinion of the Lord Chancellor and the Law Officers of the Crown', March 1945, Public Record Office FO 371/50759 (U 1949). On the British discussion about the legal status of Germany, see Donnison, *Central Organisation*, op. cit. above (p. 264 n. 49), at pp. 125-36.

<sup>72</sup> The position before 7 May 1945 is widely viewed as one of normal belligerent occupation. However, as some anti-Nazi measures taken early in the belligerent phase show, there was not a completely sharp distinction between the two stages of the occupation of Germany.

<sup>73</sup> *This Year Book*, 23 (1946), pp. 135-6.

structure of Germany within the rights of belligerent occupation. These are symbols of sovereign government, yet it is of the essence of belligerent occupation that it does not claim such powers.

...

It is not . . . surprising that International Law—inadequate to cope with many problems of our days—should not be fully equipped to deal with an entirely unprecedented situation.<sup>74</sup>

The majority of court decisions took the line that the Allied occupation of Germany after its surrender was not subject to the Hague Regulations.<sup>75</sup> For example, in *Dalldorf and Others v. Director of Public Prosecutions* a Control Commission Court of Appeal in the British Zone of Germany ruled on 31 December 1949 that Section III of the Hague Regulations was not applicable to the Allied occupation of Germany after unconditional surrender.<sup>76</sup>

These views as to the legal status of Germany after surrender were by no means uncontested.<sup>77</sup> Nor did such views mean that there was a complete international legal vacuum. Even the post-surrender phase may be said to have been subject to 'such rules of international law as limit the right of any Government to commit acts which constitute crimes against peace and crimes against humanity'.<sup>78</sup>

The 1949 Geneva Conventions appear to have substantially changed the situation. Under common Article 2 it would seem that they are applicable to post-surrender occupations, at least for as long as a state of war between the parties continues—i.e. until there is a proper treaty of peace.<sup>79</sup> In these occupations, as in others, there are limits to the modifications which can be contained in any agreement between the parties.<sup>80</sup> However, under Article 6, which is discussed further below, the application of 1949 Geneva Convention IV may be modified in occupied territory one year after the general close of military operations.

Writers have increasingly inclined to the view that post-surrender occupations have been brought within the scope of the law on occupations. True, in 1952 Oppenheim's *International Law* still took the view that post-surrender occupations are not subject to the customary and conventional rules relating to occupations.<sup>81</sup> Von Glahn agrees with Oppenheim that the Hague Regulations were not applicable to Germany after 1945, but suggests that in future cases the 1949 Geneva Convention IV would be

<sup>74</sup> Friedmann, *The Allied Military Government of Germany* (1947), pp. 65, 67.

<sup>75</sup> For a brief listing of cases see Greenspan, *op. cit.* above (p. 262 n. 42), at p. 216 n.

<sup>76</sup> *Annual Digest*, 16 (1949), Case no. 159, p. 435.

<sup>77</sup> See the excellent survey of the various theories as to the legal status of Germany from 1945 by Theodor Schweisfurth, in *Encyclopaedia of Public International Law*, vol. 3 (1982), pp. 196–7.

<sup>78</sup> *Ibid.*

<sup>79</sup> Pictet, *op. cit.* above (p. 253 n. 11), at p. 22.

<sup>80</sup> 1949 Geneva Convention IV, Articles 7, 47, etc.

<sup>81</sup> Oppenheim, *op. cit.* above (p. 256 n. 20), at pp. 216, 552–4, 602–5. In none of these passages is there any mention of the 1949 Geneva Convention IV, although it has a bearing on the matter.

applicable.<sup>82</sup> The United Kingdom military manual, and also Greenspan, take a similar line on the applicability of 1949 Geneva Convention IV.<sup>83</sup> Schwarzenberger suggests that in international customary law the only limitations on a victor's discretion are those imposed by the standard of civilization; but he goes on to suggest that even an instrument of unconditional surrender may not free a party from such multilateral engagements as the 1949 Geneva Convention IV, or even possibly the Hague Regulations.<sup>84</sup>

In summary, there have been two main schools of thought about the application of occupation law to post-surrender occupations. The first is that such occupations are quite different in character from belligerent occupations, particularly because they may involve making fundamental and permanent changes altering the whole character of the defeated State. Hence the law on occupations is seen as largely irrelevant. The second view is to accept that post-surrender occupations are bound to be different from belligerent occupations, but nevertheless to urge the applicability of the law on occupations, which is after all capable of being adjusted to a wide variety of circumstances. The facts that 1949 Geneva Convention IV adopts such an approach; that certain derogations can sometimes be permitted (as in the 'unless absolutely prevented' proviso in Hague Regulations Article 43); and that there is some room for special agreements between the parties, all tend to reinforce the second view.

#### 6. *Occupation one year after military operations*

Some occupations continue for a very long time after the end of the fighting, invasion, etc., with which they began. Lengthy occupations of this kind can give rise to special problems, both practical and legal. Also, certain provisions of occupation law—particularly those based on a presumption of a continuing armed conflict—may lose their relevance.

The 1949 Geneva Convention IV, Article 6, paragraph 3, provided that in occupied territory the Convention shall cease to apply one year after the general close of military operations: after that time, to the extent that the occupying power exercises the functions of government in occupied territory, it is only obliged to observe a list of forty-three articles of the 159-article Convention. However, these forty-three articles do include no less than twenty-three of the thirty-two articles of that part of the Convention—section III—which deals most specifically with occupied territories. The forty-three articles which remain in force are important, covering as they do such matters as the humane treatment of protected persons.

<sup>82</sup> Von Glahn, *op. cit.* above (p. 261 n. 39), at pp. 281, 283. On p. 27 he says of post-surrender and other types of occupation: 'Unless regulated in advance by treaty with the government involved, the occupant would appear to be bound by the provisions of the Hague Regulations and subsequent international lawmaking treaties.'

<sup>83</sup> UK Manual, *op. cit.* above (p. 256 n. 20), at p. 140 n.; Greenspan, *op. cit.* above (p. 262 n. 42), at pp. 216–17, 224–7.

<sup>84</sup> Schwarzenberger, *op. cit.* above (p. 267 n. 67), at pp. 318–19.

The 'one year after' provision was much debated at the 1949 Diplomatic Conference.<sup>85</sup> Pictet states that in drawing up this provision 'the delegates naturally had in mind the cases of Germany and Japan'.<sup>86</sup> The curtailment of the application of parts of the Convention seems to have derived from a reasonable, though hardly infallible, belief that after the cessation of hostilities a time would come when the full application of the Convention was no longer justified, especially if most of the governmental and administrative duties carried out at one time by the occupying power had been handed over to the authorities of the occupied territory. For example, Pictet defended those provisions of Article 6 on the grounds that

... if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified.<sup>87</sup>

The 1977 Geneva Protocol I abrogates the 'one year after' provisions as outlined above. Article 3 simply states that 'the application of the Conventions and of this Protocol shall cease . . . in the case of occupied territories, on the termination of the occupation . . .'. Bothe, Partsch and Solf say of this abrogation:

Article 6 (3) of the Fourth Convention . . . was a special *ad hoc* provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.<sup>88</sup>

The abrogation of the 'one year after' rule may reflect in part the proper desire of the international community to maintain the full applicability of the law on occupations to areas occupied by Israel since 1967. However, the idea that the law on occupations—or major parts of it—can remain applicable more or less indefinitely, leaves open some disturbing possibilities. For example, one or another party to a conflict might refuse to negotiate a peace treaty, and at the same time seek to have aspects of the status quo within occupied territory preserved. According to Israeli interpretations, this is what Arab States have sought to do in the Middle East since 1967. In this view, the law on occupations is being invoked as an enduring safety net against the consequences of diplomatic immobilism. On the other hand, Israel may see some advantage in the continuation of the status of occupied territory, because this arrangement provides a legal basis for treating the Arab inhabitants of the territories entirely separately

<sup>85</sup> See, e.g., *Final Record 1949*, vol. IIA, pp. 623–5.

<sup>86</sup> Pictet, *op. cit.* above (p. 253 n. 11), at p. 62.

<sup>87</sup> *Ibid.*, p. 63. Pictet goes on to suggest that in cases where there has been no military resistance, no state of war and no armed conflict, the Convention would remain fully applicable as long as the occupation lasts. However, it is far from clear (a) whether this was the intention of the negotiators; and (b) what the logic is in treating such occupations differently.

<sup>88</sup> Bothe, Partsch and Solf, *op. cit.* above (p. 254 n. 16), at p. 59. See also p. 57.

from the citizens of Israel: such a view suggests that the law on occupations could potentially pave the way for a kind of *apartheid*. Whatever the views on such matters, it remains the case that occupations of exceptional length do expose certain inadequacies in a body of law essentially intended for much briefer and more precarious periods of foreign military control.

### (b) *Peacetime*

The dividing line between war and peace has never been easy to identify; armed conflicts have often occurred between States without any formal declaration of war, and military interventions have often occurred without the kind of hostilities we associate with the word 'war'.<sup>89</sup> Since 1945 the dividing line between war and peace may have become less significant than it was before, owing partly to the use of the more widely applicable phrase 'use of force' rather than 'war' in the United Nations Charter and subsequent treaties.

Although the types of occupation discussed below belong mainly to peacetime, it is obvious that they may occur shortly before a war, or in its aftermath; or indeed these (or closely analogous types of occupation) could occur in a particular territory or country at the same time as other States are involved in some wider war or armed conflict. Moreover, some 'peacetime' occupations may be very reasonably viewed as crimes against peace, threats to the peace or acts of war.<sup>90</sup>

Two main types of peacetime occupation can be identified, namely, forcible peacetime occupation and peacetime occupation by consent—i.e. resulting from an agreement between the parties.<sup>91</sup> Sometimes the term *pacific occupation* (*occupatio pacifica*) is applied to both these types of peacetime occupation,<sup>92</sup> sometimes exclusively to the latter type.<sup>93</sup>

Although peacetime occupations have varied particularly widely, and have arisen from a variety of legal bases, some more or less common features may be identified. Examining various nineteenth- and early twentieth-century peacetime occupations, Jones suggested that they often

<sup>89</sup> For a wealth of supporting evidence see Maurice, *Hostilities Without Declaration of War: An Historical Abstract of the Cases in Which Hostilities Have Occurred Between Civilized Powers Without Declaration of War or Warning* (1883); Grob, *The Relativity of War and Peace: A Study in Law, History, and Politics* (1949).

<sup>90</sup> For an excellent discussion see Brownlie, *op. cit.* above (p. 250 n. 3), at pp. 84–8, 211–12, 384–400. Note particularly the judgment of 14 April 1949 in *US v. Weizsaecker and Others*, also cited below (p. 276 n. 102).

<sup>91</sup> Robin, *Des Occupations militaires en dehors des occupations de guerre* (Paris, 1913), pp. 9–11, 719–20, etc. For the most part this work is more interesting for its wealth of historical material than for its sometimes eccentric legal classifications.

<sup>92</sup> *Occupatio pacifica* seemed to be used in this broad sense by Jones in his 1924 article 'Military Occupation of Alien Territory in Time of Peace', *loc. cit.* above (p. 265 n. 55), at p. 150, but see his note of caution on p. 161. See also Bothe in *Encyclopaedia of Public International Law*, vol. 4, pp. 67–8.

<sup>93</sup> 'Pacific occupation is based on a special agreement or treaty covering the rights and duties of the occupant': Fraenkel, *op. cit.* above (p. 262 n. 42), at p. 183.

last for a very long time: they may be provisional but they are not necessarily precarious. He further said:

In the case of pacific occupation it is clear that the rights of the occupant are very much curtailed as compared with those of a belligerent occupant. In the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation . . . Belligerent military occupation is now largely regulated by the provisions of the Hague Convention, 1907, and obviously a pacific military occupant can have no powers more extensive than those laid down in the Articles of this Convention.<sup>94</sup>

Analysing judgments arising from military occupations in peacetime, or during an armed conflict not amounting to a war, McNair and Watts indicate that 'there seems to have been a tendency to act upon a basis broadly analogous to that of a belligerent occupation during a war'.<sup>95</sup> The terms of the 1949 Geneva Conventions, and particularly common Article 2, must reinforce such a tendency. They apply to an occupation arising from an armed conflict not constituting a war, and also to other cases of occupation of a territory of a party, even if the occupation meets with no armed resistance.<sup>96</sup>

#### 7. *Forcible peacetime occupation*

This is the occupation of all or part of the territory of a State without the previous consent of the government, but also without causing the outbreak of an armed conflict with that State. Usually it is because the invader has made an implicit or explicit threat to use force, and military resistance against invasion appears hopeless, that this kind of invasion is militarily unopposed. Such interventions have been quite common in the twentieth century and have occurred in a variety of circumstances.

The Hague Regulations have been widely viewed as applicable to forcible peacetime occupations. Since such occupations are by definition not governed in advance by any specific bilateral agreement between occupant and occupied, there has naturally been a strong tendency to apply to this type of occupation the existing body of international law governing belligerent occupations. As regards the invasion of Bulgaria by the Romanian army in 1913, which was a military operation without

<sup>94</sup> Jones, loc. cit. above (p. 265 n. 55), at pp. 159–60. On the general issue of international rules applicable to peacetime occupations see also Robin, op. cit. above (p. 273 n. 91), at pp. 13–15, 630, 722, 731–2; Feilchenfeld, op. cit. above (p. 261 n. 39), at p. 116; Castrén, op. cit. above (p. 267 n. 64), at p. 214; Debbasch, *L'Occupation militaire: pouvoirs reconnus aux forces armées hors de leur territoire national* (1962), pp. 1, 85–7, etc.

<sup>95</sup> McNair and Watts, op. cit. above (p. 266 n. 57), at p. 423. Many of the judgments which they examined in the preceding pages arose from what are here included under the heading of 'peacetime occupations'.

<sup>96</sup> The 1947 Conference of Government Experts had been even more explicit that the Conventions should be applicable to 'cases of occupation of territories in the absence of any state of war': Pictet, op. cit. above (p. 253 n. 11), at p. 18.

any fighting, Grob (discussing the matter hypothetically) favoured the applicability of the Hague Regulations.<sup>97</sup>

Courts have generally supported such a view of forcible peacetime occupations. Thus in a case during the Franco-Belgian occupation of the Ruhr area of Germany in 1923–5, it seems to have been accepted by both German and French parties that the Hague Regulations were applicable, even if there was some inevitable disagreement about how they should be interpreted.<sup>98</sup>

The *locus classicus* of the applicability of the Hague Regulations to forcible peacetime occupation is the German occupation of Bohemia and Moravia, which had started in March 1939, six months before the outbreak of the Second World War. The International Military Tribunal at Nuremberg said in its judgment in 1946 that the rules of land warfare (including of course the Hague Regulations) applied to the occupation of Bohemia and Moravia, because ‘these territories were never added to the Reich, but a mere protectorate was established over them’.<sup>99</sup>

Although the Nuremberg judgment did thus assert the applicability of the Hague rules in Bohemia and Moravia, it did not solve all problems relating to the status of territories occupied in peacetime. For example, the IMT did not explicitly spell out what the status of Bohemia and Moravia had been between the invasion in March 1939 and the outbreak of war in September, a question which was not essential to the case before it. A reasonable inference is that the Hague rules were applicable from the start of that occupation. Such a view on the status of occupied Czechoslovakia had already been taken in August 1943 by the Supreme Court of Victoria, Australia, in the case of *Anglo-Czechoslovak and Prague Credit Bank v. Janssen*, in which the court expressed the view that the same rules applied in a military occupation in time of peace as in a belligerent occupation.<sup>100</sup>

The matter of the legal status of Austria, occupied by Germany on 12 March 1938, is complicated by several facts, including: (a) that there was a last-minute telegram of invitation, though only from the Interior Minister, and it hardly disguised the reality that Austria was in the process of yielding to brute force; and (b) on 13 March Austria was declared a part of the German Reich. There have been several legal theories about this occupation. Clute has expressed scepticism as to whether post-Anschluss Austria is properly viewed as a case of belligerent occupation, and has said that none of the terms applied to this situation seems adequate.<sup>101</sup> It may

<sup>97</sup> Grob, op. cit. above (p. 273 n. 89), at pp. 280–1.

<sup>98</sup> See the report of the cases of *In re Thyssen and Others* and *In re Krupp and Others*, in *Annual Digest*, 2 (1923–4), Case no. 191, pp. 327–8. A critical journalist’s account of these two cases is Gedye, *The Revolver Republic* (1930), pp. 102–3.

<sup>99</sup> *The Trial of German Major War Criminals* (London, 1946–51), vol. 22, p. 467. For a text of Hitler’s proclamation of 16 March 1939 on the legal and constitutional status of Bohemia and Moravia, see *Keesing’s Contemporary Archives*, p. 3486.

<sup>100</sup> *Annual Digest*, 12 (1943–5), Case no. 11, p. 47.

<sup>101</sup> Clute, op. cit. above (p. 258 n. 28), at p. 21.

be that it should have been categorized as an occupation, but in fact it was not widely so viewed, and to the extent that there was not the sharp conflict of allegiance characteristic of most occupations there would have been little point in such a categorization. Post-war decisions indicate an understandable reluctance to view Austria as having been an occupied country. The question of the applicability of the Hague Regulations was not directly tackled by the International Military Tribunal at Nuremberg, but it did come up in other cases. A post-war United States Military Tribunal ruled that the Hague Regulations were not applicable to Austria 1938-45, but added:

In so ruling, we do not ignore the force of the argument that property situated in a weak nation which falls a victim to the aggressor because of incapacity to resist should receive a degree of protection equal to that in cases of belligerent occupation when actual warfare has existed.<sup>102</sup>

Whatever uncertainties there may be in relation to some past episodes, the present situation is clearer. In accordance with its common Article 2, second paragraph, 1949 Geneva Convention IV is applicable to forcible peacetime occupations. As Bothe has said, 'the notion of "pacific" coercive occupation as distinguished from belligerent occupation does not have any current practical significance'.<sup>103</sup>

The Soviet-led occupation of Czechoslovakia beginning on 20-1 August 1968 was a fairly clear example of forcible peacetime occupation, but the application of the Geneva Conventions was little discussed in that case—no doubt partly because the Czechoslovak governmental and legal system continued to function effectively (albeit under obvious constraints) in the months and years after the invasion.<sup>104</sup>

### 8. *Peacetime occupation by consent*

The idea of 'peacetime occupation by consent' raises problems: if foreign forces are in a country in peacetime, in accordance with an agreement with its government, there is bound to be a presumption against using such terminology to describe the situation: a troop stationing agreement does not create an occupation.<sup>105</sup> In addition, there are bound to be doubts about the relevance of the law on occupations, essentially a

<sup>102</sup> *US v. Krauch and Others*, judgment of 29 July 1948, *Annual Digest*, 15 (1948), Case no. 218, p. 672. However, see also the judgments in *US v. Weizsaecker and Others*, in which it was held that the German invasions of Austria and Czechoslovakia 'were tantamount to, and may be treated as, a declaration of war': *ibid.* 16 (1949), Case no. 118, p. 347; and in *US v. Uhl*, in which evidence of United States recognition of the consolidation of Austria with Germany was presented: *ibid.* 12 (1943-5), Case no. 8, pp. 23-9.

<sup>103</sup> *Encyclopaedia of Public International Law*, vol. 4, p. 68.

<sup>104</sup> For a characterization of the Czechoslovak situation as a 'Soviet-led invasion and occupation', see the statements of United States Representative Herbert Reis in the United Nations Committee on Principles of International Law, published in *Department of State Bulletin*, 14 October 1968, pp. 394-401.

<sup>105</sup> Below, pp. 297-8.

part of the laws of war, to a situation characterized both by the absence of armed conflict and by the positive fact of an agreement between the parties.

However, the idea of peacetime occupation by consent is not entirely devoid of meaning or practical importance. It has long been recognized as a distinct type. Sometimes, as noted above, the term 'pacific occupation' (*occupatio pacifica*) has been applied exclusively to this type. Others have preferred the rather more specific term 'conventional occupation'; or, where it is intended as a means of safeguarding the withdrawal of armed forces from foreign territory following the conclusion of a peace treaty, it may be called an 'evacuation occupation'.<sup>106</sup> Whatever term is used, a key distinguishing feature of such an occupation is that it takes place on the basis of a valid agreement or treaty, not obtained by duress against the negotiators, in which the States provide in advance for the occupation of all or part of the territory of one of them. Such an occupation may sometimes be intended as a guarantee that the State whose territory is occupied will execute the terms of a treaty. It will normally only be considered an occupation to the extent that there is an identifiable foreign military command structure actually exercising authority in the territory.

As with other types of occupation involving an element of consent, the invitation, agreement or treaty which brings such an occupation into being is likely to be an important means of stipulating the terms of that occupation, and is likely to vary greatly according to different circumstances. Some writers have gone so far as to suggest that the agreement in question is the only basis for determining the terms of a peacetime occupation by consent.<sup>107</sup>

Peacetime occupations by consent are now fairly rare. One often-cited example is the occupation of the left bank of the Rhine by the Allied and Associated Powers under the terms of the Versailles Treaty signed on 28 June 1919 and of the separate Rhineland Agreement of the same date. This is hardly a paradigmatic example, as it was the continuation of an already existing armistice occupation. The purpose of continuing this occupation of part of Germany was largely to ensure Germany's fulfilment of the provisions of the Treaty of Versailles. The applicability of the Hague Regulations to this occupation was the subject of different interpretations. There was a tendency to argue as to whether the Rhineland Agreement, or the Hague Convention, was the source of the occupants' authority, with the Germans wanting the occupants to have fewer powers than those laid down in the Hague, and the French wanting as many or more.<sup>108</sup> The

<sup>106</sup> Both these terms are used by Robin, *op. cit.* above (p. 273 n. 91), at pp. 10, 11, 15; and by von Glahn, *op. cit.* above (p. 261 n. 39), at p. 27.

<sup>107</sup> Robin comes fairly close to this position: *op. cit.* above (p. 273 n. 91), at pp. 13, 15, 722, etc. Schwarzenberger argues this line on general grounds, without at this point citing cases or authorities: *op. cit.* above (p. 267 n. 67), at p. 321.

<sup>108</sup> Fraenkel, *op. cit.* above (p. 262 n. 42), at pp. 100, 184, 192, 199. The text of the Rhineland Agreement is in an Appendix.

Hague Regulations were still important in a number of specific ways. First, they had assisted in working out the terms of the initial agreement: indeed, Article 6 of the Rhineland Agreement explicitly referred to the 1907 Hague Convention. Thereafter they were useful as a stopgap, in matters where problems arose which were not covered by the initial agreement.<sup>109</sup> Courts took the line that the rules drawn up at The Hague were valid not only in regard to an occupation 'based solely on force and on disregard of treaties', but also, *a fortiori*, in regard to an occupation 'which was carried out in virtue of a treaty . . .'.<sup>110</sup>

A very different type of peacetime occupation by consent derives from the practice of sending troops into a country on the basis of an invitation from a host government, and thereafter taking over important administrative or leadership functions in that country. Although those directly involved are likely to find other terms for the situation, the end result may be so similar to a foreign occupation that it might reasonably be so viewed, and the law on occupations might reasonably be regarded as applicable. Take, for example, a deeply divided and weak country, facing civil war. It has an unpopular government with a clear external ideological orientation, which invites in a sympathetic superpower ally. That ally then largely dominates indigenous political developments, and there are even allegations that it had complicity in the assassination of the embarrassingly unpopular head of the government which had invited it in. It also gets deeply involved in counter-insurgency operations against the regime's opponents. This is a rough approximation of the situation in Afghanistan since the Soviet intervention of December 1979.<sup>111</sup> It also bears some similarities to the situation of South Vietnam at the time of United States involvement between the mid-1950s and 1973. The international element in such conflicts appears to be so marked that the better developed body of international law governing international armed conflicts and occupations may well be viewed as applicable.

A central difficulty of applying the law on occupations to situations of this type is likely to be the argument to the effect that the conflict is basically internal, and that foreign forces, acting by invitation, are supposedly not occupants. So far as 1949 Geneva Convention IV is

<sup>109</sup> See, e.g., Feilchenfeld, *op. cit.* above (p. 261 n. 39), at pp. 118-19.

<sup>110</sup> Judgment of the Military Court of the Belgian Army of Occupation in the Rhineland in the case of *In re Boulanger*, 19 April 1923. See also the same court's earlier judgment in the case of *Auditeur Militaire v. Reinhardt and Others*: 'Legally there can be a military occupation even in cases where there is no war properly so-called; there is nevertheless an *occupatio bellica*': *Annual Digest*, 2 (1923-4), Case no. 239, pp. 441, 442.

<sup>111</sup> The situation in Afghanistan has been criticized in successive United Nations resolutions as one of 'foreign armed intervention', without the actual word 'occupation' being used. See, e.g., GA Resolutions 36/34 of 18 November 1981, and 37/37 of 29 November 1982. However, many governments have referred to this situation as an occupation. For example, on 13 July 1982 the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote that Britain and China 'have similar views on such international issues as the Soviet occupation of Afghanistan and the Vietnamese occupation of Cambodia': this *Year Book*, 53 (1982), p. 353.

concerned, there are two possible answers to this problem. First, Articles 7 and 47 establish that any special agreements (for example, between the authorities of the occupied territories and the occupying power) may not adversely affect the situation of protected persons. It appears that these articles can refer to agreements concluded before as well as during hostilities;<sup>112</sup> and presumably, therefore, before an occupation also. A second and less legalistic answer might be to assert that the Convention embodies important general rules for the protection of civilians from a foreign military power in whose hands they are, and these rules should be faithfully observed irrespective of whether the situation is designated as an 'occupation' or as something else.

### (c) *Other Possible Categories*

The types of occupation discussed below can occur in wartime or in peacetime. In every case the actual historical examples mentioned could also fit into one or more of the eight categories already considered.

#### 9. *Occupation of territory whose status is disputed or uncertain*

Many invasions and occupations take place in territories whose previous status was something less than full and internationally accepted sovereignty. It is sometimes claimed that the law on occupations is not formally applicable to such cases, on the grounds that the Hague and Geneva Conventions talk about the occupation of the territory of a hostile State, or of a high contracting party. What if the status of the territory is more confused, or is the subject of competing claims? Throughout this century territorial disputes have often preceded or accompanied military occupations, as illustrated by the cases mentioned earlier of the Greek occupation of Ottoman territories after 1912–13 and the Allied occupation of Western Thrace in 1918–20. In the contemporary world, four principal forms of occupation-cum-territorial dispute may be noted.

First, it may simply be asserted by a State with irredentist claims that the territory which is the subject of dispute is occupied. For example, Japanese leaders of all political persuasions have for a long time, and especially since the early 1970s, called for the return of some or all of four islands at the southern end of the Kuril chain—namely, the Habomais, Shikotan, Kunashir and Iturup—which were occupied by the Soviet Union between 29 August and 4 September 1945. A 'Northern Territories Day' has been marked in Japan by rallies every year since 1981. Often the islands are referred to in Japanese political statements as occupied. However, since 20 September 1945 the Soviet Union has viewed these islands as an integral part of its territory; these islands are the subject of exceptionally tangled territorial disputes; and no Japanese live there now, because the 17,000 Japanese residents had all fled or been forcibly

<sup>112</sup> Pictet, *op. cit.* above (p. 253 n. 11), at pp. 67–8, 274–5.

'repatriated' to Japan proper by 1949. Thus, whatever the position was in 1945, the law on occupations—which in any case has little to say which is relevant to the actual current situation on the islands—is bound to be viewed by the USSR as inapplicable today.<sup>113</sup>

Secondly, States sometimes invade territory which they have long claimed, and then find themselves in the position of occupant of what they assert to be their own territory. For example, there had been a long-standing dispute between the United Kingdom and Argentina over title to the Falkland Islands before the Argentine invasion of 2 April 1982 and the consequent Argentine occupation. The Argentine authorities saw their action as a reclaiming of national territory: but there does not appear to have been any claim that the laws of war (including the law on occupations) were not applicable. The facts that the inhabitants were clearly foreign so far as the Argentines were concerned, and that a struggle for the territory was continuing, strengthened the case for viewing this as an occupation.<sup>114</sup>

A third and quite distinct kind of situation can arise in territories where a colonial power has embarked on withdrawal. Sometimes, before a new indigenous authority has been able fully to consolidate its position or get its statehood recognized, the territory has been invaded by a neighbour.

Perhaps the clearest example of this was Indonesia's invasion of East Timor on 7 December 1975. Indonesia appears to have had no previous claim to the territory. However, it expressed alarm at the prospect of a revolutionary government there, and intervened to support a coalition of political parties which favoured integration with Indonesia.<sup>115</sup> The ensuing occupation, marked by numerous acts of brutality, was opposed locally by Fretilin guerrillas;<sup>116</sup> and was repeatedly criticized in United Nations General Assembly resolutions, which continued to assert the population's right to self-determination.<sup>117</sup>

A somewhat similar case, at roughly the same time, was the Moroccan intervention in Western Sahara. With Spain, the colonial power, on the

<sup>113</sup> The best account of the dispute concerning the 'northern territories' claimed by Japan is in Stephan, *The Kuril Islands: Russo-Japanese Frontier in the Pacific* (1974), pp. 151–247. He is critical of Japan's handling of the dispute. Other useful sources include *Keesing's Contemporary Archives*, pp. 7732, 7418, 27599, 28292; Whymant, 'Japan Steps up Fight for Return of Lost Islands', *The Guardian* (London), 8 February 1984.

<sup>114</sup> A useful collection of statements on legal aspects of the 1982 Falklands war is Marston, 'UK Materials on International Law 1982', this *Year Book*, 53 (1982), pp. 350–559 *passim*. United Kingdom designations of the situation on the islands after 2 April 1982 as a 'military occupation' are at pp. 351, 352.

<sup>115</sup> For a fine critical survey see Clark, 'The "Decolonization" of East Timor and the UN Norms on Self-Determination and Aggression', *Yale Journal of World Public Order*, 7 (1980), pp. 2–44.

<sup>116</sup> Amnesty International statement of 2 September 1983 to United Nations Decolonization Committee; and reports in *The Guardian* (London), 25 June and 20 July 1983. 'Fretilin' is short for Frente Revolucionaria de Timor Leste Independente.

<sup>117</sup> GA resolutions on East Timor have included 3485 (XXX) of 12 December 1975; 33/39 of 13 December 1978; 36/50 of 24 November 1981; and 37/30 of 23 November 1982. The word 'occupation' does not appear in these resolutions: only 'military intervention', 'continuing critical situation' and 'the humanitarian situation prevailing in the territory'.

brink of departure, an advisory opinion of the ICJ, delivered on 16 October 1975, said that the population of the area had a right to prior consultation about the future of the territory.<sup>118</sup> Morocco, however, asserted its claim to the territory in early November with the 'Green March', in which some 350,000 unarmed Moroccans entered the area. On 14 November a tripartite agreement was announced in which Spain agreed to hand over control to Morocco and Mauritania. In December 1975 and January 1976 Moroccan troops occupied the main towns, and the last Spanish troops left on 12 January 1976. Since then Morocco has extended its control, including areas first held by Mauritania. It has been opposed locally by the Polisario Front (supported *inter alia* by Algeria and Libya), and its policy has been heavily criticized in regional organizations and in the United Nations. For example, a 1979 General Assembly resolution referred to the 'inalienable right of the people of Western Sahara to self-determination and independence', supported the Polisario Front as 'the representative of the people of Western Sahara', and deplored 'the continuing occupation of Western Sahara by Morocco and the extension of that occupation to the territory recently evacuated by Mauritania'.<sup>119</sup>

Fourthly, a belligerent occupation, arising almost as a by-product of a larger international war, may be of territory whose status is not completely clear. For example, Israel had not before 1967 made any territorial claims to the West Bank and Gaza, but nor had it accepted that these territories were part of Jordan or Egypt. When it found itself in control of these territories, Israel argued that the 1949 Geneva Convention IV was not formally applicable. In support of this argument Israel repeatedly referred to the second paragraph of common Article 2, which says the Convention applies to 'occupation of the territory of a High Contracting Party'. It contended that the previous status of the occupied territory had been less clear than that, but said that it would apply the 'humanitarian provisions' of the Convention on a *de facto* basis, as well as offering to co-operate fully with the International Committee of the Red Cross.<sup>120</sup> The Israeli military courts likewise frequently referred to the second paragraph.<sup>121</sup>

<sup>118</sup> See *Western Sahara* advisory opinion, *ICJ Reports*, 1975, pp. 12-176. On the history of the dispute see Shaw, 'The *Western Sahara* Case', this *Year Book*, 49 (1978), pp. 119-54; Brownlie, *African Boundaries: A Legal and Diplomatic Encyclopaedia* (1979), pp. 149-58.

<sup>119</sup> The quotations are from GA Res. 34/37, adopted on 21 November 1979. A similar resolution, 35/19, was approved on 11 November 1980. 'Polisario' is short for Frente Popular para la Liberacion de Saguia el-Hamra y de Rio de Oro.

<sup>120</sup> For an authoritative Israeli statement putting forward such a viewpoint see the article by the former Military Advocate General (1961-8), then Attorney-General of Israel (1968-75), Meir Shamgar, 'The Observance of International Law in the Administered Territories', *Israel Yearbook on Human Rights*, 1 (1971), pp. 262-77. See also the refined and developed presentation in Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967-1980: The Legal Aspects*, vol. 1 (1982), pp. 13-59. For an earlier exposition of the legal status of the West Bank see Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria', *Israel Law Review*, 3 (1968), pp. 279-301. Blum was later appointed Israeli Permanent Representative to the United Nations.

<sup>121</sup> For a typical reference by a court to the second paragraph of Article 2 of the 1949 Geneva Convention IV, see the judgment of the Military Court sitting in Bethlehem on 11 August 1968 in the

The Israeli interpretation of the second paragraph of Article 2 of the 1949 Geneva Convention IV seems excessively legalistic and has been almost universally rejected.<sup>122</sup> Sometimes it has been rejected on grounds of general principle.<sup>123</sup> However, most of those who have been critical of Israel in this matter of the applicability of the Civilians Convention have, like the Israeli authorities themselves, argued their case with reference to the second paragraph of Article 2.<sup>124</sup> As a result the whole debate on the matter may have been on the wrong foot from the beginning. As noted above, it is in fact the *first* paragraph which applies in cases of belligerent occupation.<sup>125</sup> However, this does not necessarily change things greatly. Shamgar argues that even if one accepts the thesis that it is the first paragraph that applies, one still cannot disregard the reference in the second paragraph to 'the territory of a High Contracting Party', since there would be no logic in an occupation which does not meet with armed resistance being alone subject to this restrictive definition. He therefore indicates that in strictly formal terms the 1949 Geneva Convention IV is not applicable.<sup>126</sup> The weakness of his argument on this point is that he nowhere mentions the existence of a custom of viewing the laws of war, including the law on occupations, as formally applicable even in cases which differ in some respect from the conditions of application as spelt out in the Hague and Geneva Conventions. As far as the Israeli occupation of the West Bank and Gaza is concerned, the majority of the international community, and of international legal opinion, has not accepted that Geneva Convention IV is not formally applicable just because the previous status of the territories may have been slightly different from what those who negotiated the 1949 Geneva Convention IV may have had in mind. The 1977 Geneva Protocol I further clarifies that the 1949 Geneva Convention is applicable in such territories.<sup>127</sup>

case of *Military Prosecutor v. Zuhadi Salah Hassin Zuhad*, 47 ILR 490-1. The judge did, however, state: 'I assume that I must resort to the Convention as if it were applicable.'

<sup>122</sup> Of the very many GA resolutions affirming the applicability of 1949 Geneva Convention IV in the Israeli-occupied territories, one which is limited to that issue, and can thus be presumed to serve as an indication of the position taken by States on the matter, is 35/122A of 11 December 1980. The voting was 141 for, 1 against (Israel) and 1 abstention (Guatemala): *Yearbook of the United Nations*, 34 (1980), p. 430.

<sup>123</sup> The ICRC has taken the view, relevant to the Israeli and also to other cases, that there is an occupation (and hence the Civilians Convention is applicable) whenever during an armed conflict 'territory under the authority of one of the parties passes under the authority of an opposing party': *Israel Yearbook on Human Rights*, 1 (1971), p. 260; and International Committee of the Red Cross, *Annual Report* for 1968, 1973, 1975, 1976, 1977, 1978, etc.

<sup>124</sup> Of the many writings asserting the applicability of the 1949 Geneva Convention IV to the areas occupied by Israel since 1967 on the basis of the second paragraph of Article 2, see particularly one by a legal adviser of the United States State Department specializing in Middle Eastern affairs, Stephen M. Boyd, 'The Applicability of International Law to the Occupied Territories', *Israel Yearbook on Human Rights*, 1 (1971), pp. 258-61. On p. 260 he indicates that he is relying on the second paragraph of Article 2; this is confirmed in the subsequent discussion on pp. 366-7.

<sup>125</sup> See the text of Article 2 and the reference to Pictet's commentary on it, above, pp. 252-3.

<sup>126</sup> Shamgar, *op. cit.* above (p. 281 n. 120), at p. 40.

<sup>127</sup> See above, pp. 254-5 and 272-3.

A number of Israeli writers have argued that it does not matter whether the 1949 Geneva Convention IV is formally applicable or not, as Israel in any case observes the 'humanitarian provisions' of this Convention.<sup>128</sup> However, formal applicability versus *de facto* application is not always a distinction without a difference. This is for two reasons. First, there has never been a full clarification as to whether 'humanitarian provisions' means all of the provisions, or just those which Israel decides to apply. Secondly, the rejection of formal applicability has been frequently referred to in Israeli court proceedings, and has been one factor occasionally making the courts reluctant to base their decisions directly on 1949 Geneva Convention IV.<sup>129</sup> (Another quite separate consideration influencing Israeli courts has been the argument that the courts are bound by customary international law, in which category they have come to include 1907 Hague Convention IV; but not by conventional international law, in which category they include all, or at least some, of 1949 Geneva Convention IV.)<sup>130</sup>

Another possible case of an occupation of a territory whose status is uncertain (at least in the sense that it has never been a sovereign State) is the South African occupation of Namibia, discussed later in this article.<sup>131</sup>

Even from the few cases cited, it is evident that in the contemporary world the previous status of occupied territory tends to be more muddled and complex than the status which appears to have been envisaged in the provisions of the main conventions. However, this does not necessarily prevent the applicability of the law on occupations.<sup>132</sup> The 1977 Geneva Protocol I, Article 4, further confirms that the law is applicable even in cases where there is doubt about the legal status of the territory in question.

<sup>128</sup> See, e.g., the foreword by Haim H. Cohn to the booklet *The Rule of Law in the Areas Administered by Israel* (Israel National Section of the International Commission of Jurists, Tel Aviv, 1981), pp. vii-viii.

<sup>129</sup> See, e.g., the statement of Judge Landau of the Supreme Court in the *Beth-El* case, judgment given 15 March 1979, reprinted in Shamgar, op. cit. above (p. 281 n. 120), at p. 387.

<sup>130</sup> See, e.g., the articles by Nathan and Hadar in *ibid.*, pp. 125-49 and 172-5. Also the judgments in the *Beth-El* case, *ibid.*, pp. 377-81 and 388-90; and in the *Elon Moreh* case, *ibid.*, pp. 419 and 438. The *Elon Moreh* case, judgment given on 22 October 1979, illustrates the potential significance of relying on the Hague rather than the Geneva rules. On the basis of Article 52 of the Hague Regulations (which deals with requisitions) the Supreme Court declared an Israeli civilian settlement near Nablus in the occupied West Bank to be illegal. It took this line mainly because there was sharply conflicting Israeli official evidence as to whether the settlement was needed for security reasons. It did not base its decision on the at least apparently relevant provision of 1949 Geneva Convention IV, Article 49, sixth paragraph: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' Thus the *Elon Moreh* decision had little bearing on such other Israeli settlements as (a) did not involve requisitions, or (b) were declared by the Israeli authorities to be needed for security. In fact the settlement of *Elon Moreh* was built. It stands impressively, not far from its original site, on a hill close to and visible from Nablus.

<sup>131</sup> Below, pp. 291-2.

<sup>132</sup> Bothe in *Encyclopaedia of Public International Law*, vol. 4, pp. 64-5.

### 10. *Occupation with an indigenous government in post*

Although the prevailing image of military occupation is of direct and overt foreign rule, in practice occupants often work through indigenous political forces and institutions. They may leave in power the already existing government of the occupied territory; or set up a new but still indigenous government; or even assist the creation of a new supposedly sovereign State.

The first approach—permitting the existing government to remain in post and exercise the functions of government—was followed, though very imperfectly, in German-occupied Denmark between April 1940 and August 1943; in the Soviet and British occupation of Iran from 1941 to 1946; and in Czechoslovakia after the Soviet-led invasion of August 1968. Sooner or later in all these cases there were significant changes in the leadership of the State, government or ruling party, but these changes were not necessarily in themselves unconstitutional. For example, when Dubcek was removed from the post of First Secretary of the Czechoslovak Communist Party in April 1969, and replaced by Husak, the change was achieved by procedures which had every appearance of formal propriety.

The second approach—encouraging the advent to power of new indigenous governmental authorities—is also quite common. The classic example is the Quisling regime in Norway between 1 February 1942 and the end of the war in 1945: this regime was the instrument of the Germans who had invaded the country in April 1940. A more recent example, in a totally different political context, occurred in Kampuchea after the Vietnamese invasion of December 1978, which promptly replaced the genocidal Pol Pot regime with a more acceptable one.<sup>133</sup> Such authorities established under the wing of an occupying power may be mere ‘puppet governments’, but they may in some cases enjoy a measure of independence, legitimacy or popular support.

The third approach is the encouragement by the occupant of the creation of new purportedly sovereign States, sometimes called ‘puppet States’. Examples include the ‘State of Manchukuo’, set up by the Japanese in Manchuria in 1932; the ‘Slovak State’, set up after the Germans occupied the bulk of Czechoslovakia in March 1939;<sup>134</sup> and Croatia, after the German occupation of Yugoslavia in April 1941.<sup>135</sup> But these are extreme cases of new ‘States’ whose claims to be anything

<sup>133</sup> GA Resolutions 35/6 of 22 October 1980 and 36/5 of 21 October 1981 called the situation in Kampuchea since 1978 one of ‘foreign armed intervention’. Resolution 37/6 of 28 October 1982 called it one of ‘foreign armed intervention and occupation’.

<sup>134</sup> On Slovakia, George Kennan reported to the State Department on about 1 May 1939: ‘In internal matters, it has exactly the same independence as a dog on a leash. As long as the dog trots quietly and cheerfully at his master’s side—and in the same direction—he is quite free; if he starts out on any tangents of his own, he feels the pull at once’: Kennan, *From Prague After Munich* (1968), p. 135.

<sup>135</sup> Crawford, *The Creation of States in International Law* (1979), pp. 63–4. See also his excellent discussion of the maintenance or emergence of statehood during a foreign military occupation on pp. 59–60, 68–9, 281–2.

more than the agent of the occupant were extremely weak. Other cases of the emergence of new States during foreign military occupations are not so easily dismissed. The two Germanies, already mentioned, have established their credentials as States. In Korea, following thirty-five years of Japanese rule there, United States and Soviet forces occupied the southern and northern parts of the country respectively in 1945. After the failure of various talks aimed at unification, new States were eventually proclaimed in the two halves of Korea in August and September 1948. The United States wound up its military government in the South, and in the North all Soviet forces were withdrawn by the end of the year.<sup>136</sup>

Where there are indigenous authorities in post in any of the several fashions indicated above, does the law on occupations apply? The clearest treaty provision on the matter is 1949 Geneva Convention IV, Article 47, which states that protected persons shall not be deprived of the benefits of the Convention 'by any change introduced, as a result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power'. Pictet comments:

It will be noted that the same clause applies both to cases where the lawful authorities in the occupied territory have concluded a derogatory agreement with the Occupying Power and to cases where that Power has installed and maintained a government in power.<sup>137</sup>

Where there is both an occupying power and an indigenous government, whose job is it to ensure the implementation of the law on occupations? Common sense suggests that this is a shared responsibility. However, the applicability of the law to occupations where indigenous authorities exercise control can present some special problems. Three are indicated below.

First, there is sometimes a risk that an occupying power will allow, or fail to prevent, the indigenous authorities from acting in a manner contrary to the law on occupations. This risk is particularly great in those cases where an occupant permits local leaders of sectional groups (whether regional, ethnic or sectarian) to exercise power. Yugoslavia under the Axis occupation in the Second World War provides a classic example of the disasters which can ensue: the carve-up of the country, the wielding of power by irresponsible gangs, communal violence and massacres.

Echoes of such problems arose in Lebanon following the June 1982 Israeli invasion of southern Lebanon. In contrast to their practice in areas occupied in the June 1967 war, where they promptly set up systems of military administration, in Lebanon the Israelis acted largely through local paramilitary forces of one kind or another. This policy led straight to

<sup>136</sup> On the occupation of Korea, see esp. Soon Sung Cho, *Korea in World Politics 1940-1950: An Evaluation of American Responsibility* (1967), pp. 61-244.

<sup>137</sup> Pictet, *op. cit.* above (p. 253 n. 11), at p. 275.

disaster in the shape of the massacres at Sabra and Shatilla camps in Beirut in September 1982. This was not just the result of operating indirectly, through local paramilitary forces (a policy which in itself was particularly questionable in a country as bitterly divided as Lebanon), but also of failing to make clear that all the provisions of the law on occupations were fully applicable to the situation.<sup>138</sup> Subsequently there was still a comparative lack of authoritative and clear guidance from the Israeli Government on the legal situation in the occupied areas. However, the Israeli Supreme Court confirmed in several decisions the view that Israel was the occupying power. As it said in 1983 in the *Ansar Prison* case,

A military force may invade or enter an area in order to pass through it to its intended goal and it may leave that area without establishing any effective control. But if the military force has taken control of the area in an effective and workable manner, then even though its presence in such area is limited in time or its intention is to set up no more than a temporary military control, the situation thereby created is one to which the rules of warfare dealing with belligerent occupation apply. Furthermore, the application of the third chapter of the Hague Rules or of the parallel instructions in the Fourth [Geneva] Convention are not conditioned upon the establishment of a special organizational framework in the form of a Military Government . . .

Allowing the former government to act does not alter the fact that the military force is maintaining an effective military control in the area, nor does it relieve the occupant from the responsibilities for the consequences of such acts as far as the rules of warfare are concerned.<sup>139</sup>

A second and somewhat different problem of indirect control is that, in some occupations at least, there may be room for doubt as to whether international law should seek to govern a wide range of aspects of the relations between indigenous authorities and their own subjects. Such involvement is likely to be dismissed by the authorities as 'impermissible interference'.

For example, following the Turkish invasion of northern Cyprus in July–August 1974, the situation could properly be viewed as one of military occupation; and it was so viewed by the Government of Cyprus and by the United Nations General Assembly.<sup>140</sup> However, the facts that

<sup>138</sup> The Kahan Report, published in early 1983, the *Final Report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut*, contains an authoritative account of these events. It refers on p. 54 to 'the lack of clarity regarding the status of the State of Israel and its forces in Lebanese territory', but does not try to resolve this issue. The report bases its criticisms of certain Israeli actions mainly on a concept of public morality and on the book of Deuteronomy. Relevant international agreements such as the 1949 Geneva Convention IV are not mentioned, even though many Articles (e.g. 4 and 144) were applicable to the situation in the camps, and urgently needed to be implemented.

<sup>139</sup> Judgment delivered 13 July 1983. Telex transcript, pp. 13, 16.

<sup>140</sup> GA Resolutions 33/15 of 9 November 1978 and 34/30 of 20 November 1979 deplored 'the continued presence of foreign armed forces and foreign military personnel on the territory of the Republic of Cyprus and the fact that part of its territory is still occupied by foreign forces'. Resolution 37/253 of 13 May 1983 deplored 'the fact that part of the territory of the Republic of Cyprus is still occupied by foreign forces' and demanded 'the immediate withdrawal of all occupation forces from the Republic of Cyprus'.

the declared aim of this operation was to protect the Turkish minority living in Cyprus from the Greek majority, and that a new political entity (the Turkish Federated State of Cyprus) was set up in 1975, gave this occupation a special colour. Not surprisingly, the Turkish Cypriot authorities did not appreciate the application of the term 'occupation' to their situation.<sup>141</sup> On 15 November 1983 their elected assembly went so far as to claim the status of a sovereign State by approving a Declaration of Independence and proclaiming the 'Turkish Republic of Northern Cyprus'—a move which did not win the hoped-for international recognition. Irrespective of the validity of this last act, an argument could be made that not all aspects of the law on occupations were designed for a situation such as this; and in particular that the prohibitions of making extensive legal and political changes may sometimes be of limited relevance where the desire both of the occupants and of most of the inhabitants of the area actually occupied is precisely to make certain changes. On the other hand, in the *Cyprus v. Turkey* cases before the European Commission of Human Rights, the Government of Cyprus vigorously asserted that violations of human rights by Turkey in the Turkish-occupied areas (including the detention or murder of some 2,000 missing Greek Cypriots and the refusal to allow more than 170,000 Greek Cypriot refugees to return to their homes) were contrary to the European Convention on Human Rights, and were matters of legitimate international concern. The applications of the Government of Cyprus were ruled admissible by the European Commission of Human Rights on 26 May 1975 and 10 July 1978—a significant recognition in principle of the applicability of international human rights law to occupied territories.<sup>142</sup>

Thirdly, where there are indigenous authorities in post, occupants often seek to buttress any claims that the situation is not one of occupation at all by using a particular device—a subsequent treaty with the 'host' government for the stationing of foreign armed forces. This happened in Iran, where, following the Anglo-Soviet military intervention on 25 August 1941, a Treaty of Alliance between the UK, USSR and Iran was signed at Teheran on 29 January 1942. Article 4 said:

The Allied Powers may maintain in Iranian territory land, sea and air forces in such number as they consider necessary . . . It is understood that the presence of these forces on Iranian territory does not constitute a military occupation and will disturb as little as possible the administration and the security forces of Iran, the economic life of the country, the normal movements of the population and the application of Iranian laws and regulations.<sup>143</sup>

<sup>141</sup> Nedjatigil, *The Cyprus Conflict: A Lawyer's View* (1981), p. 75. The author, a senior Turkish Cypriot official, asserts that the situation is not one of occupation, partly it would seem on the grounds that the Turkish invasion was sanctioned under the 1960 Treaty of Guarantee, and partly on the grounds that the Turkish forces 'are present in Cyprus to assist the security forces of the Turkish Federated State of Cyprus'. Such considerations may affect one's view of the occupation, but do not necessarily change the fact of its being an occupation of part of the territory of the Republic of Cyprus.

<sup>142</sup> 62 ILR 5 at pp. 5–10, 82–3.

<sup>143</sup> *United Nations Treaty Series*, vol. 93, p. 279.

Similarly, following the Soviet interventions in Hungary in October and November 1956 and in Czechoslovakia in August 1968, treaties on the temporary stationing of Soviet troops were concluded. Both treaties specified that they did not affect the sovereignty of the host State, and that the forces involved would not interfere in its internal affairs.<sup>144</sup>

In theory, such agreements have no more power than any other agreement to affect the application of the 1949 Geneva Convention IV: the provisions of Articles 7, 8 and 47 seem unambiguous. However, the awkward question may be raised: could an agreement on the stationing of armed forces mean that a given situation could no longer be properly regarded as an occupation at all? Whatever the answer to this question, it may well be the case in particular instances that such agreements limit the role of foreign forces so stringently that many of the potential points of friction between the inhabitants and the occupant, which are addressed in the law on occupations, are unlikely to arise in practice. To the extent that this is so, the situation may bear some resemblance to a more normal basing of foreign forces in peacetime.<sup>145</sup>

In general, there does seem to be a tendency in the contemporary world to operate through indigenous political forces, rather than to impose direct external control. The fact that all the major powers subscribe to anti-colonial ideologies or principles of one kind or another has undoubtedly reinforced this tendency. So far as the applicability of the law on occupations is concerned, this tendency poses problems, but they are not insuperable. Even if in some instances the authorities reject any categorization of the situation as occupation, they may still apply the relevant rules; and the international community may put pressure on them to do so.

### 11. *Subsequent occupation*<sup>146</sup>

This is an occupation by one belligerent which follows an occupation of the same region by another belligerent. In such a case the Hague Regulations and the Geneva Conventions apply without difficulty, except in regard to the continuation or modification of measures adopted by the earlier belligerent occupant. Article 43 of the Hague Regulations, obliging the occupant to respect 'unless absolutely prevented, the laws in force in the country', may not be so relevant in such circumstances. There is a risk that this Article could be used to maintain in force any and every piece of draconian legislation enacted by previous domestic or foreign rulers. Such a possibility may be indicated by Gaza, where various rules from the

<sup>144</sup> Agreement Concerning the Legal Status of Soviet Forces Temporarily Stationed in the Territory of the Hungarian People's Republic, signed in Budapest 27 May 1957, Article 1 (*United Nations Treaty Series*, vol. 407, p. 170). Treaty Between the Government of the USSR and the Government of the Czechoslovak Socialist Republic on the Conditions of Temporary Sojourn of Soviet Forces on the Territory of the Czechoslovak Socialist Republic, signed in Prague 16 October 1968, Article 2 (*International Legal Materials*, 7 (1968), p. 1334).

<sup>145</sup> Below, pp. 297-8.

<sup>146</sup> The term was first used by Feilchenfeld, *op. cit.* above (p. 261 n. 39), at p. 7.

period when the territory was occupied by Egypt remain in force (as, incidentally, do some laws from the period of the British mandate), alongside more recent Israeli laws and orders.<sup>147</sup>

## 12. *Multilateral occupation*

A territory may be jointly occupied by several States which are allied to each other, and are perhaps under a unified command system. There have been many such occupations in this century, because of the tendency of States, for many reasons, to use armed force on a multilateral basis. Where a region is so occupied, 'the regular rules on belligerent occupation will then apply, but the jurisdictional relationships between the allies will have to be determined'.<sup>148</sup> In a few cases such occupations have resulted in (or been a disguised form of) division of a country into separate parts.

## 13. *Occupation by United Nations or similar forces*

Forces acting under the aegis of the United Nations could conceivably be in occupation of all or part of the territory of a State, either in the course of an enforcement action, or in the course of an armed peacekeeping operation. In addition, other international peacekeeping forces (perhaps on the lines of the multinational force in the Lebanon 1982-4) could theoretically find themselves in the role of occupant if, for example, the government which had invited them in collapsed totally, without any successor, and the force stayed on to maintain order.

The general question of whether the laws of war apply to United Nations forces has been much discussed. The United Nations itself is not a party to any international agreements on the laws of war, and these agreements do not expressly provide for the application of the laws of war by United Nations forces. However, it is widely held that the laws of war remain applicable to such forces. The great majority of writers have taken such a view, although with some differences of emphasis on the issue as to whether United Nations forces are bound by every provision of the laws of war, or mainly by customary rules, or by some distillation or adaptation of rules which is relevant to a United Nations force's special character and

<sup>147</sup> However, Israel has taken the view that the rules of international law do not prohibit the liberalization of punitive measures, and in all the territories occupied in 1967 it quite promptly abolished the mandatory death penalty previously imposed by Egypt, Jordan and Syria for a wide range of offences: Shamgar, *op. cit.* above (p. 281 n. 120), at pp. 45 and 52.

<sup>148</sup> Feilchenfeld, *op. cit.* above (p. 261 n. 39), at p. 8. See also Baxter, 'Constitutional Forms and Some Legal Problems of International Military Command', this *Year Book*, 29 (1952), pp. 355-7. An instance of costly failure to work out a satisfactory basis for relations between allies was in the confused occupation of parts of Turkey by various Allied powers following the Armistice of Mudros between Britain and Turkey, signed on 30 October 1918: Busch, *Mudros to Lausanne: Britain's Frontier in West Asia 1918-1923* (1976), pp. 62-97. Text of the Mudros Armistice: Parry, *The Consolidated Treaty Series*, vol. 224, p. 169.

purpose.<sup>149</sup> The United Nations Organization itself has in practice accepted the applicability of the general laws of war to its own forces and to those of its adversaries both in enforcement actions and in peacekeeping operations. In the Korean War, despite some ambiguities, forces under the United Nations claimed no exemption from the laws of war; and the fact that the United Nations force in Korea consisted of national contingents voluntarily contributed to a unified command under the delegated operational responsibility of one member State underlined the point that the application of the laws of war was a responsibility of States as well as of the United Nations Organization itself.<sup>150</sup> In subsequent operations, for example in the Middle East, Congo and Cyprus, the United Nations has instructed forces under its authority to observe 'the principles and spirit of the general international Conventions applicable to the conduct of military personnel'.<sup>151</sup> In these operations, too, States have retained a responsibility for their contingents with reference to matters relating to the application of the laws of war.<sup>152</sup> This tendency to stress the responsibility of States may in part be due to the existence of some practical difficulties in implementation of the laws of war by the United Nations as such. Any rule which presumes, for example, that the State applying it has territory of its own, or which depends on the application of a State's own national standards, would create a difficulty because the United Nations lacks these characteristic features of statehood. In this connection it may be noted that the United Nations has never as such assumed custody of prisoners of war.

The more specific question of whether United Nations forces could be considered occupants has been less extensively discussed. It is uncontroversial that in an enforcement action United Nations forces could well find themselves in belligerent occupation of territory, and that most or all of the customary and conventional laws of war would then apply.<sup>153</sup> As for

<sup>149</sup> For example, Taubenfeld, 'International Armed Forces and the Rules of War', *American Journal of International Law*, 45 (1951), pp. 671-9; Baxter, loc. cit. (previous note), pp. 357-9; Lauterpacht, 'The Limits of the Operation of the Laws of War', this *Year Book*, 30 (1953), pp. 242-3; Bowett, *United Nations Forces* (1964), pp. 484-516; Seyersted, *United Nations Forces in the Law of Peace and War* (1966), pp. 178-426; the resolutions on the subject adopted by the Institute of International Law in 1971 and 1975, reprinted in Schindler and Toman, *The Laws of Armed Conflicts* (2nd edn., 1981), pp. 815-20; Sandoz, 'The Application of Humanitarian Law by the Armed Forces of the UNO', *International Review of the Red Cross*, 206 (1978), pp. 274-84.

<sup>150</sup> Stone, op. cit. above (p. 250 n. 3), at p. 316; Brownlie, op. cit. above (p. 250 n. 3), at p. 400; Bowett, op. cit. (previous note), pp. 55, 487; Seyersted, op. cit. (previous note), pp. 182-97; Higgins, *United Nations Peacekeeping 1946-1967*, vol. 2, *Asia* (1970), pp. 188-95.

<sup>151</sup> For texts of United Nations Regulations containing these words, see, e.g., Seyersted, op. cit. above (n. 149), at pp. 190, 442; and Higgins, *United Nations Peacekeeping 1946-1967*, vol. 1, *The Middle East* (1969), pp. 288-92.

<sup>152</sup> Seyersted, op. cit. above (n. 149), at pp. 190-2, 321-7. This responsibility of individual States was explicitly recognized in a 1966 Agreement between the United Nations and Sweden relating to the Swedish Contingent to the United Nations Force in Cyprus. Text *ibid.*, p. 445.

<sup>153</sup> Bowett, op. cit. above (n. 149), at pp. 490-1; Seyersted, op. cit. above (n. 149), at pp. 281-3. Both discuss briefly whether United Nations forces might be in a privileged position *vis-à-vis* certain rules. On the essentially American (as distinct from United Nations) character of military government activities during the Korean War, see Kyre, *Military Occupation and National Security* (1968), pp. 43, 69.

United Nations peacekeeping forces, where these act within one State on the basis of status of forces agreements between the United Nations and the host State (such as the United Nations Emergency Force in Egypt in 1956–67) they would not be in occupation of the territory as the term has been traditionally used in international law.<sup>154</sup> It is just conceivable, however, that in different circumstances a peacekeeping force could find itself organizing some kind of ‘occupation by consent’. Moreover, if central authority in the host State were to collapse, a peacekeeping force might find itself extending its authority and taking full charge of such matters as public order and safety.

The situation in the Congo during the United Nations operation 1960–4 affords one example illustrating the possibility of a United Nations peacekeeping force finding itself in a role closely analogous to that of an occupant. At the outset, the United Nations Secretary-General, Dag Hammarskjöld, stated that the force, which was ‘under the exclusive command of the United Nations’, was ‘not under the orders of the Government nor can it . . . be permitted to become a party to any internal conflict . . .’.<sup>155</sup> But Congolese political developments made it unclear for a time who was the constitutional government, and there was United Nations intervention in administrative activities and in internal conflict beyond what had originally been envisaged.<sup>156</sup>

#### 14. *Occupation of territory for which the United Nations is responsible*

The possibility of a State’s occupation of territory which is under the legal responsibility of the United Nations is indicated by the South African presence in Namibia. In 1966 South Africa’s mandate (dating from 1920) was terminated by the United Nations General Assembly, which reaffirmed that the territory had ‘international status’ and decided that it came henceforth ‘under the direct responsibility of the UN’.<sup>157</sup>

<sup>154</sup> The Summary Study on the experience of UNEF which the Secretary-General prepared in 1958 defined its functions in a manner distinguishing it rather clearly from an occupying power. Para. 15 stated: ‘The Force has no rights other than those necessary for the execution of the functions assigned to it by the General Assembly and agreed to by the country or countries concerned. The Force is paramilitary in character and much more than an observer corps, but it is in no sense a military force exercising, through force of arms, even temporary control over the territory in which it is stationed; nor does it have military objectives, or military functions exceeding those necessary to secure peaceful conditions on the assumption that the parties to the conflict will take all the necessary steps for compliance with the recommendations of the General Assembly’: Higgins, *op. cit.* above (p. 290 n. 151), at pp. 485–6.

<sup>155</sup> Quoted in Higgins, *United Nations Peacekeeping 1946–1967*, vol. 3, *Africa* (1980), p. 125. On the applicability of the laws of war to United Nations forces in general, and to those in the Congo in particular, see also Simmonds, *Legal Problems Arising from the United Nations Military Operations in the Congo* (1968), pp. 168–74, 174–96. He does not specifically address the question of whether United Nations forces can be military occupants.

<sup>156</sup> Higgins, *op. cit.* (previous note), pp. 125–210. The text of the status agreement of 27 November 1961 between the United Nations and the Republic of the Congo is on pp. 199–206. See also *inter alia* Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (1978), esp. pp. 54–123.

<sup>157</sup> GA Res. 2145 (XXI) of 27 October 1966. For a text of the League of Nations Mandate of 17 December 1920 see Bentwich, *The Mandates System* (1930), pp. 185–7.

Despite this resolution, South Africa continued to administer the territory. In 1968 the United Nations General Assembly, in deploring South Africa's refusal to withdraw from the territory, passed the first of many resolutions describing the situation there as one of 'foreign occupation' and 'illegal occupation'.<sup>158</sup> In 1971 the International Court of Justice, in an advisory opinion, stated that 'the continued presence of South Africa in Namibia being illegal, South Africa is under an obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the territory'. It also said that some multilateral conventions 'such as those of a humanitarian character' may be viewed as binding so far as Namibia is concerned.<sup>159</sup> Since then, numerous United Nations resolutions have expressed concern at the continued illegal occupation of Namibia by South Africa.<sup>160</sup>

There is much room for disagreement as to the exact status of Namibia and the exact extent of the United Nations' responsibility. Sagay has argued that the United Nations Council for Namibia has the full powers of statehood and is the *de jure* government of the territory.<sup>161</sup> Others have suggested that, in view of the limited nature of the United Nations' personality, the organization cannot assume the role of territorial sovereign, but does have a capacity to administer territory.<sup>162</sup> Differences on such points do not necessarily affect the validity of the view that Namibia is under foreign occupation.<sup>163</sup>

### 15. *Occupation by a non-State entity*

Sometimes in armed conflicts the forces of an organized body which is not recognized as the government of a sovereign State (it may, for example, be a 'liberation movement') may occupy territory of a neighbouring State—for example, with the aim of securing supply routes, base areas or sanctuary. Without entering at all into specifics, the possibility of such a type of occupation is indicated by the entry of Yugoslav partisans into Trieste in the closing phase of the Second World War; the role of forces of the National Liberation Front of South Vietnam in frontier areas of Cambodia up to 1975; and the activities of forces of the Palestine Liberation Organization in parts of Lebanon in the 1970s and early 1980s.

<sup>158</sup> GA Resolutions 2372 (XXII) of 12 June 1968 and 2403 (XXIII) of 16 December 1968.

<sup>159</sup> *ICJ Reports*, 1971, advisory opinion of 21 June 1971, pp. 58, 55.

<sup>160</sup> See, e.g., Security Council Resolutions 366 of 17 December 1974 and 385 of 30 January 1976; GA Resolutions 2871 (XXVI) of 20 December 1971, 35/227 of 6 March 1981 and 37/233 of 20 December 1982.

<sup>161</sup> Sagay, *The Legal Aspects of the Namibian Dispute* (1975), pp. 271–83.

<sup>162</sup> Brownlie, *Principles of Public International Law* (3rd edn., 1979), pp. 175–9.

<sup>163</sup> British Government statements in 1982 indicated that the United Kingdom views Namibia as 'under unlawful occupation by South Africa', but does not accept that Namibia is a sovereign State, and considers that 'the UN General Assembly acted beyond its competence in setting up the UN Council for Namibia with the powers with which it purported to endow it': Marston, 'UK Materials on International Law 1982', this *Year Book*, 53 (1982), pp. 391–3.

The general applicability of the laws of war to certain liberation movements is clear enough.<sup>164</sup> However, the specific possibility of a liberation movement occupying the territory of another State does not appear to have been discussed either at the 1949 or the 1974–7 diplomatic conferences at Geneva—perhaps because liberation movements are widely viewed as underdogs, not overlords. One may hazard the opinion that the law on occupations ought to be applied fully in the event of an occupation by a non-State entity, but some provisions might be hard to implement in cases where the occupant lacks some of the resources which a State enjoys.

#### 16. 'Illegal occupation'

Many military occupations have been called, usually by their critics, 'illegal occupations'. This term is almost invariably used to refer to an occupation which is perceived as being the outcome of aggressive and unlawful military expansion, or as being maintained in defiance of authoritative pronouncements by international bodies calling for a withdrawal. South Africa's 'illegal occupation' of Namibia, as it was called in the 1971 advisory opinion of the International Court of Justice, is the clearest contemporary example.<sup>165</sup>

Do the same international legal provisions apply to such an illegal occupation as apply to an occupation which is, say, a by-product of fighting a defensive war? There has long been a minority tendency, especially strong in some countries which suffered frightful losses under German occupation in the Second World War, to deny that an aggressor occupant has any rights under the Hague or any other conventions. A number of Soviet writers have taken such a view.<sup>166</sup> Some post-war judgments in Polish courts inclined in the same direction.<sup>167</sup> A number of publications and statements of the Palestine Liberation Organization have also adopted this approach.<sup>168</sup>

However, the view that the laws of war apply equally to all occupations, even to those created by illegal acts of aggression, is persuasive and

<sup>164</sup> 1949 Geneva Convention III, Article 4A (2); 1977 Geneva Protocol I, Articles 1 (4) and 96; Veuthey, op. cit. above (p. 249 n. 2), *passim*.

<sup>165</sup> Above, pp. 291–2.

<sup>166</sup> See particularly Trainin's 1945 article, of which an English translation appeared in *American Journal of International Law*, 40 (1946), p. 555; Tunkin, *Theory of International Law* (1974), p. 411. However, by no means all Soviet international lawyers have taken this line: see Kulski, 'Some Soviet Comments on International Law', *American Journal of International Law*, 45 (1951), pp. 347–9; Kozhevnikov (ed.), *International Law* (Moscow, 1961), pp. 427–30.

<sup>167</sup> See the judgment of the Supreme National Tribunal of Poland in *In re Greiser* on 7 July 1946: *Annual Digest*, 13 (1946), Case no. 166, p. 388; and also the different decisions of the court of first instance, the District Court and the Supreme Court (the latter on 13 April 1948) in the case of *N. v. B.*, which concerned the ownership of a mare which had been confiscated and auctioned by the German occupation authorities: 24 ILR 941–3.

<sup>168</sup> Yahia, *The Palestine Question and International Law* (Palestine Liberation Organization Research Center, Beirut, June 1970), p. 184; also statement of the Permanent Observer Mission of the PLO at UNESCO, dated 10 April 1981 and published in UNESCO document 22 C/18 dated 30 August 1983, Annex IV, p. 28, para. 11.

undoubtedly represents the bulk of legal opinion. The International Military Tribunal at Nuremberg unequivocally affirmed the applicability of the 1907 Hague Convention in occupied territory, and referred explicitly to the occupant's rights to collect taxes and make requisitions in kind.<sup>169</sup> A number of other post-war judgments strongly supported the view that international law makes no distinction between a lawful and an unlawful occupant in dealing with the respective duties of occupant and population in occupied territory.<sup>170</sup> This view has been supported by the great majority of writers.<sup>171</sup> However, some writers do envisage that in certain very restricted spheres (for example, in considering title to property) there may be some room for applying a principle of discrimination against aggressor occupants, at any rate after the cessation of hostilities.<sup>172</sup>

The applicability of humanitarian rules to all occupations, whether 'legal' or 'illegal', is indicated by the wording of common Article 2 of the 1949 Geneva Conventions, referring as it does to 'all cases of partial or total occupation . . .'. Furthermore, the preamble of the 1977 Geneva Protocol I reaffirms 'that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict . . .'.

### 17. 'Trustee occupation'

This questionable term was advanced by Allan Gerson in 1973. He indicated that not all the provisions of the law on occupations need necessarily apply in cases (such as the Jordanian occupation of the West Bank from 1948 to 1967 and the Israeli occupation thereafter) characterized, it would seem, by the following features: (a) the previous legal status of the territory was not one of full sovereignty; (b) the occupation is allegedly 'lawful' rather than 'unlawful'—i.e. is not the result of a war of aggression; and (c) the occupant seeks positively to develop the territory in some way—for example, politically or economically. He suggested:

<sup>169</sup> *The Trial of German Major War Criminals* (London, 1946–51), vol. 22, pp. 457, 467. Although the Soviet member of the IMT, General I. T. Nikitchenko, delivered a long dissenting opinion (pp. 531–47), he did not raise any question about the applicability of the Hague Regulations.

<sup>170</sup> See, e.g., the judgment of US Military Tribunal V in the *Hostages* case (*USA v. Wilhelm List et al.*), loc. cit. above (p. 260 n. 37), at p. 1247. On the applicability of the Hague Regulations specifically in German-occupied Poland, see the judgment on 10 March 1948 in the *RuSHA* case (*USA v. Ulrich Greifelt et al.*) in *ibid.*, vol. 5, p. 154; and the judgment on 29–30 July 1948 in the *IG Farben* case (*USA v. Carl Krauch et al.*) in *ibid.*, vol. 8, p. 1137.

<sup>171</sup> See, e.g., Lauterpacht, 'The Limits of the Operation of the Law of War', this *Year Book*, 30 (1953), p. 220; Stone, *op. cit.* above (p. 250 n. 3), at p. 695; Brownlie, *op. cit.* above (p. 250 n. 3), at pp. 406–8; McNair and Watts, *op. cit.* above (p. 266 n. 57), at pp. 371–2.

<sup>172</sup> Lauterpacht, loc. cit. (previous note), pp. 233–7; Morgenstern, 'The Validity of the Acts of the Belligerent Occupant', this *Year Book*, 29 (1952), p. 321 n.; Schwarzenberger, *op. cit.* above (p. 267 n. 67), at pp. 105–6; Skubiszewski, loc. cit. above (p. 250 n. 3), at p. 811.

Israel should replace Jordan as trustee-occupant for the indigenous Palestinian Arabs. As such, Israel should be held responsible for fostering the political and economic self-determination of the region, unburdened by the traditional restraints imposed by the law of belligerent occupation against alteration of the *status quo ante*.<sup>173</sup>

The problem to which the concept of 'trustee occupation' is addressed is real enough. There are often occasions when it is unrealistic or undesirable to stick strictly to a policy of preserving the *status quo ante*. Such occasions may indeed arise in many occupations with features quite different from those indicated by Gerson and outlined above.

However, Gerson's advocacy of the term suffers from several defects. He appears to assume that the 1949 Geneva Convention IV applies only to 'belligerent occupation' fairly narrowly defined, even though Article 2 clearly makes the Convention much more broadly applicable. Secondly, he bases his argument on the claim, which is not properly substantiated, that in occupation law there is a significant distinction between 'aggressor-occupants' and 'lawful-occupants'.<sup>174</sup> Thirdly, he appears to neglect the extent to which the idea of 'trusteeship' is implicit in all occupation law anyway. The idea that all occupants are in some vague and general sense trustees is nothing new. Sir Arnold Wilson suggested in 1932 that 'enemy territories in the occupation of the armed forces of another country constitute (in the language of Article 22 of the League of Nations Covenant) a sacred trust, which must be administered as a whole in the interests both of the inhabitants and of the legitimate sovereign or the duly constituted successor in title'.<sup>175</sup> The Hague Regulations and the 1949 Geneva Convention IV can be interpreted as putting the occupant in a quasi-trustee role. Von Glahn refers to occupants as exercising 'a temporary right of administration on a sort of trusteeship basis'.<sup>176</sup> All this diminishes still further any case for regarding 'trustee occupation' as a separate category of occupation.

## V. CASES DISTINCT FROM MILITARY OCCUPATION

Although military occupations are very varied, they are not endlessly so. Not every advance of armed forces into inhabited territory amounts to an occupation, or brings into play the law on occupations. Two possible areas of exception are: (a) occupation of one's own territory; and (b) stationing of foreign military forces by agreement. In addition (c) some other cases distinct from military occupation are briefly enumerated.

<sup>173</sup> Gerson, 'Trustee Occupant: The Legal Status of Israel's Presence in the West Bank', *Harvard International Law Journal*, 14 (1973), pp. 1-49; and his subsequent book, *Israel, the West Bank and International Law* (1978), esp. pp. 78-82. Note his frank recognition on p. 82 that Israel has not in fact assumed the role of trustee occupant.

<sup>174</sup> Gerson, loc. cit. above (previous note), p. 3.

<sup>175</sup> Sir Arnold Wilson, 'The Laws of War in Occupied Territory', *Transactions of the Grotius Society*, 18 (1933), p. 38.

<sup>176</sup> Von Glahn, *Law Among Nations* (4th edn., 1981), p. 673.

(a) *Occupation of One's Own Territory*

In conflicts of various kinds, both international and internal, governments sometimes exercise direct military control within the accepted international frontiers of their State in a manner similar to that of a military occupant. For example, in the course of an international war a State may liberate part of its own territory (or what it views as such) which was previously occupied by an enemy, and then set up a system of military government there pending the re-establishment of the institutions of civil government: this happened, for example, at the end of the Second World War, when the United States reasserted control briefly in the Philippines, and likewise when the British returned to Malaya.

The applicability of the law on occupations to such situations has been the subject of different opinions. A footnote in the British military manual says that military control in such a situation 'is a matter for the domestic law of the belligerent concerned and is not regulated by international law'.<sup>177</sup> The wording of the various international conventions regarding their scope of application tends to support this view. However, in practice there have been instances in which at least some parts of the law have been viewed as applicable, especially where there was a continuing war, and also (as in some colonial territories) a degree of conflict between the returning forces and the inhabitants.<sup>178</sup> For example, the Philippines Supreme Court ruled on 6 October 1949 in *Tan Tuan v. Lucena Food Control Board*, which related to a seizure of black market goods on 14 June 1945:

This phase of the case is controlled by the laws of war . . .

The fact that this was not foreign territory did not deprive the United States Army of the status of belligerent occupant. Military government may be established not only in foreign territory occupied or invaded in time of war, but also domestic territory in a state of rebellion or civil war.<sup>179</sup>

In civil wars, too, the law on occupations may sometimes be applied. For example, when armed forces are sent to a particular area of their own State to exercise control, the authorities may implicitly or explicitly observe provisions of the law on occupations, even if they are not formally obliged to do so. The fact that the Lieber Code, which contains many provisions on occupations, was issued to Union forces in the American Civil War is an illustration of the possibilities of applying the laws of war to civil as well as international wars. However, when an 'occupation' is within a single sovereign State, the rules of international law which the parties are formally *obliged* to observe are rather few. They include common Article 3 of the 1949 Geneva Conventions, which relates to 'armed conflicts not of

<sup>177</sup> UK Manual, op. cit. above (p. 256 n. 20), at p. 141 n. One of the two cases cited in this footnote of the manual is *Public Prosecutor v. X (Eastern Java)*. But that case was in fact about occupation of allied territory, and the court asserted the applicability of the laws of war in such circumstances. See above, p. 265.

<sup>178</sup> On the somewhat analogous situation in the Falkland Islands after 2 April 1982 see above, p. 280.

<sup>179</sup> 18 ILR 591. For a similar view see also US Manual, op. cit. above (p. 256 n. 20), at p. 10.

an international character' and establishes short but clear principles relating to persons taking no active part in hostilities, including members of armed forces who have laid down their arms, the sick, the wounded, etc.<sup>180</sup> For those States which are bound by it, the rather minimal terms of the 1977 Geneva Protocol II (on non-international armed conflicts) are also applicable. So too is some human rights law. But the question of the law applicable in such essentially internal conflicts is not pursued here.<sup>181</sup>

In internal conflicts which do not amount to a full-blown civil war it is particularly unlikely that the designation of 'occupation' will be accepted. The United Kingdom's role in Northern Ireland is called an occupation by some of its adversaries, but this is not the view taken of it by the British or Irish Governments, or by other States. However, even in this case the relevance of some standards derived from the laws of war as well as other international legal norms came to be accepted.<sup>182</sup>

In most circumstances, however, governments are not only reluctant to be viewed as maintaining an occupation in their own territory or in that with which they are constitutionally linked, but are also likely to reject the application of the law on occupations. In *United States v. Vargas*, before a United States District Court in Puerto Rico in January 1974, sixteen defendants of Puerto Rican origin, who objected to being conscripted, cited 1949 Geneva Convention IV, Article 51, in their defence. The judgment in the case stated that Puerto Rico could not be characterized as an occupied territory, and recalled the reaffirmation of Commonwealth status by plebiscite in 1967. The Convention was therefore viewed as not applicable.<sup>183</sup>

### (b) *Stationing of Foreign Military Forces by Agreement*

The stationing of foreign military forces on the territory of a State in accordance with the terms of a prior agreement is in most cases

<sup>180</sup> Article 3 was stated by Mr Plinio Bolla, the Swiss delegate at the 1949 Diplomatic Conference, to cover the cases of civil war, wars of resistance and wars of liberation, but not banditry or riots: *Final Record 1949*, vol. IIB, p. 335. This approach is formalized in 1977 Geneva Protocol II, Article 1 (2). For a study of Article 3 see Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949', *Case Western Reserve Journal of International Law*, 11 (1979), pp. 37-69.

<sup>181</sup> On the applicability of the laws of war in this type of situation see Higgins, 'International Law and Civil Conflict', in Luard (ed.), *The International Regulation of Civil Wars* (1972), pp. 169-86; Taubenfeld, 'The Applicability of the Laws of War in Civil War', in Moore (ed.), *Law and Civil War in the Modern World* (1974), pp. 499-517; Veuthey, 'Some Problems of Humanitarian Law in Noninternational Conflicts and Guerrilla Warfare', in Bassiouni and Nanda, *A Treatise on International Criminal Law* (1973), vol. 1, pp. 422-52.

<sup>182</sup> The United Kingdom has fairly consistently taken the view that the situation in Northern Ireland is essentially internal, and has regarded the principles in common Article 3 of the 1949 Geneva Conventions as applicable: see, e.g., *Report of the Committee of Privy Counsellors Appointed to Consider Authorized Procedures for the Interrogation of Persons Suspected of Terrorism*, Cmnd. 4901 (1972), pp. 1, 14-15, 23. However, Lord Gardiner's minority report, which was accepted by the Government, is an interesting example of asserting the wider relevance of certain international legal standards, including some from the 1949 Geneva Conventions, in an internal conflict: *ibid.*, pp. 17-22. On the relevance of human rights law to Northern Ireland, see the materials from the case of *Ireland v. United Kingdom* in *Publications of the European Court of Human Rights*, Series B, vols. 23I-23III (1980-1).

<sup>183</sup> Report in *American Journal of International Law*, 68 (1974), pp. 744-5. On the history and status of Puerto Rico, see Carr, *Puerto Rico: A Colonial Experiment* (1984).

fundamentally different from military occupation. This is especially so where the functions of the foreign military forces are limited to the manning of certain bases, or defence against an external adversary; but even if the functions do (as in some peacekeeping operations) involve an element of exerting authority over society or maintaining public order, they do not *ipso facto* become occupations.

The legal framework within which foreign forces operate in a country is generally outlined in the particular agreement concerned.<sup>184</sup> The law on occupations is seldom relevant. Debbasch has expressed a contrary view. She has said that a military occupation occurs whenever armed forces are outside their own national territory, and that 'military bases constitute today in peacetime a living example of the idea of military occupation'.<sup>185</sup> This stretches the meaning of the term 'military occupation' to breaking-point. Although she recognizes a distinction between belligerent occupation and the maintenance of military bases in peacetime, her suggestion that both these situations are subject to a common international legal regime is not persuasive.

There are circumstances in which the stationing of foreign forces by agreement may bear some resemblance to a military occupation. This may be so in cases where the agreement was achieved through duress against the negotiators of the receiving State; where the agreement was concluded after an invasion and occupation had already begun;<sup>186</sup> or where the foreign forces, whose functions were initially presented as limited, come to exercise much more extensive powers.<sup>187</sup> To the extent that such situations do present the types of practical problems addressed in the law on occupations, then the provisions of this body of law may well be viewed as applicable.

### (c) *Other Cases Distinct From Military Occupation*

There are many other cases which, despite some superficial verbal or physical similarities with military occupation, are both in law and in fact entirely distinct. For example, in the context of consideration of title to *terra nullius*, the term 'occupation' has a specific meaning which is nothing to do with the concept of 'military occupation' as addressed in the laws of war conventions.<sup>188</sup>

<sup>184</sup> See Lazareff, *Status of Military Forces Under Current International Law* (1971); Vali, *Servitudes of International Law: A Study of Rights in Foreign Territory* (2nd edn., 1958), pp. 208-52.

<sup>185</sup> Debbasch, *op. cit.* above (p. 274 n. 94), at pp. 2-3.

<sup>186</sup> On such post-invasion agreements in Iran in 1942, Hungary in 1957 and Czechoslovakia in 1968, see above, pp. 287-8. However, there have been many cases in which occupations ended but troops remained under the terms of an agreement: see above, pp. 258-9.

<sup>187</sup> See the general discussion of peacetime occupation by consent above, pp. 276-9, including the reference to South Vietnam and Afghanistan. Note also the case of Namibia, above, pp. 291-2.

<sup>188</sup> On *terra nullius*, and occupation thereof, see Brownlie, *op. cit.* above (p. 292 n. 162), at pp. 180-1; von Glahn, *op. cit.* above (p. 295 n. 176), at pp. 316-18; Starke, *Introduction to International Law* (8th edn., 1977), pp. 185-91. A recent use of the term 'occupation' in this sense as part of a claim of title to territory was in the Foreign and Commonwealth Office pamphlet *The Falkland Islands: The*

Some writers have drawn attention to the possibility of fictitious military occupations, in which an invader declares certain areas to be occupied without in fact taking any steps to exercise control there. Clearly these are not military occupations at all, as the factual test of occupation advanced in Article 42 of the Hague Regulations remains important.<sup>189</sup>

Many territories have a status which is less than total independence and sovereignty, but is distinct from occupation not least because of the nature of the constitutional or international legal framework. Examples might include certain colonial possessions, non-self-governing and trust territories, autonomous regions and so on.

## VI. GENERAL ISSUES AND CONCLUSIONS

### (a) *The Rationale for the Concept of 'Military Occupation'*

The evidence from conventions, practice, judgments and writings all points unambiguously to the conclusion that the generic term 'military occupation' (or just 'occupation'), though by no means infinitely elastic, is a very broad one. Has it become so broad that it ceases to be either satisfactory as a factual description or useful as an indication that a particular body of law is applicable?

The breadth of the concept of occupation is indicated not so much by showing how many categories can be incorporated in a single typology, but rather by looking at the historical cases themselves, each one unique in purpose, character and outcome. If the term 'occupation' has come to refer to far more types of situation than the classic belligerent occupation indicated in the Hague Regulations of 1899 and 1907, this is not because of any intellectual fashion or progressive legal development, but rather because of the inescapably complex and varied character of military and political events. Indeed, one can say of military occupation, as Clausewitz said of war, that it is not a totally independent phenomenon, but 'a continuation of political intercourse, with the addition of other means'.<sup>190</sup>

*Facts* (HMSO, May 1982), pp. 3–4. The question of what body of principles or law should govern relations between the occupiers of *terra nullius* and any indigenous inhabitants was of great importance at the time of European colonial expansion: for a classic exposition see particularly the work of the sixteenth-century Spanish professor of theology, Franciscus de Victoria, esp. his *De Indis*, first published in his *Relectiones Theologicae* (1557). However, this question is of much more restricted significance today because there is virtually no *terra nullius* in the contemporary world. In recent cases of invasions of inhabited territory whose status is unclear (e.g. East Timor and Western Sahara), the international community has tended to view it not as *terra nullius*, but as territory whose sovereignty, although yet to be exercised, is vested in the inhabitants, whose wishes regarding forms of statehood or union should be determined by appropriate internationally agreed procedures.

<sup>189</sup> On 'so-called constructive occupation' and 'so-called fictitious occupation', see Oppenheim, *op. cit.* above (p. 256 n. 20), at p. 435; von Glahn, *op. cit.* above (p. 261 n. 39), at p. 28. On the significance of effective control as a test of occupation see also McNair and Watts, *op. cit.* above (p. 266 n. 57), at pp. 368, 372–80. Fictitious 'occupations' occur rarely if at all. The opposite problem—of an area being occupied in fact, but being said to be not occupied—is much more common.

<sup>190</sup> Von Clausewitz, *On War* (Howard and Paret translation, 1976), Book viii, chapter vi.

Occupations may be distinguished from each other not merely by the criterion of the kinds of legal or other circumstances in which they occur (the main approach adopted in this article), but also by the criterion of motive or purpose. Here too there are extreme variations. Even within one single type of occupation discussed earlier there could be any of several completely different motives, and views about these will strongly colour attitudes to any particular given episode. Occupations may be an almost accidental by-product of hostilities, or they may be the main aim of military operations. They are initiated, or later maintained, for a wide variety of ostensible purposes: to implement territorial claims; to put pressure on an adversary either to perform obligations under an already existing treaty, or else to negotiate a peace treaty; to prevent the use of the occupied territory as a military base, including for guerrilla or other attacks against the occupying State; to punish an unfriendly act, with a view to securing reparation for the act complained of; to prevent political or economic developments which cause concern to the intervening power; to re-establish order and stability in a case where government has collapsed or is in danger of so doing; to protect a given area or section of the population against internal disturbances or against foreign attack; or to enable the occupant himself to establish military bases. Other motives, justifications or excuses for occupations are not hard to find.

Faced with such bewildering varieties of types and motives of occupation, what common elements remain? Does occupation have a chameleon-like character, able to assume many different faces, forms and colours, or does it rather consist of many entirely different species?

Within the diversity there is a rationale for the concept of 'occupation'. There are important common features. At the heart of treaty provisions, court decisions and legal writings about occupations is the image of the armed forces of a State exercising some kind of domination or authority over inhabited territory outside the accepted international frontiers of their State and its dependencies. It is above all to this kind of activity that the modern law on occupations applies. Even in specific cases differing in some respects from the most classic forms of occupation, there are some markers which may help to indicate the existence of an occupation, or may suggest the need for the law on occupations to be applied. These include: (i) there is a military force whose presence in a territory is not sanctioned or regulated by a valid agreement, or whose activities there involve an extensive range of contacts with the host society not adequately covered by the original agreement under which it intervened; (ii) the military force has either displaced the territory's ordinary system of public order and government, replacing it with its own command structure, or else has shown the clear physical ability to displace it; (iii) there is a difference of nationality and interest between the inhabitants on the one hand and the forces intervening and exercising power over them on the other, with the former not owing allegiance to the latter; (iv) within an overall framework

of a breach of important parts of the national or international legal order, administration and the life of society have to continue on some legal basis, and there is a practical need for an emergency set of rules to reduce the dangers which can result from clashes between the military force and the inhabitants.

(b) *The Designation of Territory as 'Occupied'*

There are often disagreements about applying a politically and emotionally laden term such as 'occupation' to a particular situation. Parties involved—especially those on the side of the intervening forces—are often and understandably reluctant to use the word 'occupation' at all. This may be because of a fear of having to apply the full range of the law on occupations. However, the nexus of rights and duties described in that law is by no means necessarily disadvantageous to the occupant. There may be a much simpler reason for reluctance to use the word 'occupation': the adverse connotations of the word itself. To many, 'occupation' is almost synonymous with aggression and oppression.

Thus there has been widespread use of terms with a supposedly better ring: protectorate, fraternal aid, rescue mission, technical incursion, peacekeeping operation, military administration, civil administration, liberation and so on. Sometimes these terms are used in addition to the term 'occupation', in order to qualify it, to highlight the special features of a situation, and to clarify the purpose of the military action in question. Sometimes, and perhaps more often, these terms are used in total substitution for 'occupation'. Occasionally there may be some merit in not classifying a situation as an occupation: the maintenance of a fiction that a country retains its independence may act as a lever for gradually reasserting independence as a fact.

The question thus arises: who determines whether a particular situation is designated as an occupation? This answers itself in clear cases (such as some of the Second World War occupations) but not in all. The Hague and Geneva Conventions do not provide for a body to determine the circumstances in which they are applicable. Sometimes there is bound to be an element of genuine uncertainty, or of political predilection, in the designation of the status of territory. Where one or other of the parties involved disputes the term 'occupation', it is still open to other States and bodies to make clear that they consider the territory in question to be occupied, and to judge the occupant by the standard of the law on occupations. United Nations General Assembly and Security Council resolutions have often been a main means of expressing such a view.<sup>191</sup> Regional organizations such as the OAU have also played a role in such

<sup>191</sup> Territories designated by the General Assembly as occupied, and mentioned earlier in this article, have included Hungary (in a resolution in late 1956), the Israeli-occupied territories (consistently since 1967), Namibia (consistently since 1968), northern Cyprus (since 1978), Western Sahara (1979–80) and Kampuchea (1982).

designations. The ICRC has often expressed a clear view that a given territory was occupied, and that the parties were obliged to observe the relevant provisions of 1949 Geneva Convention IV, etc. In the case of Namibia, the ICJ said in 1971 that it viewed the territory as occupied.

(c) *Does the Application of the Law Depend on Such Designation?*

It is clear that there has long been a tendency to regard the law on occupations as applicable (whether on a *de jure* or *de facto* basis) to many situations, even where these differ in some important particulars from the picture of occupation presented in the relevant conventions. The question is, could the law be applied even in situations where the very designation of 'occupation' is rejected or disputed? Can one leap-frog the emotive issue of name-calling, and just get on with observing basic humanitarian rules? The additional fact that there have been some clear cases of occupations (including the post-1945 ones in Germany and Japan) to which the law on occupations was not at the time considered applicable could conceivably be a further reason for separating the issues of what a situation is called on the one hand, and what law is applicable on the other. Another consideration is that sometimes there is *de facto* observance of many provisions without any mention being made at all of the law on occupations. Thus in Czechoslovakia after August 1968, although Soviet spokesmen neither used the term occupation nor made any public reference to the Hague or Geneva Conventions, the Warsaw Pact forces on the whole acted with restraint.<sup>192</sup>

Both the ICRC and the United Nations have on numerous occasions asserted the applicability of international humanitarian law to particular situations, irrespective of the issue as to whether they count as international armed conflicts and/or occupations. For example, in 1968-9 the United Nations General Assembly urged that the 1949 Geneva Conventions III and IV be applied in conflicts in the territories under Portuguese administration;<sup>193</sup> in Southern Rhodesia after its unilateral declaration of independence;<sup>194</sup> and in southern Africa generally.<sup>195</sup> (Conversely, in at least one case mentioned earlier in this article, northern Cyprus, the General Assembly described a territory as occupied, but it did not in so many words call for the implementation of these conventions there.)

The tendency to focus on the substantive issue of observance of the law, rather than on the seemingly more semantic issue of the legal designation of a territory, could possibly be strengthened by seeking international

<sup>192</sup> However, in April 1969 Soviet representatives were reported to have threatened further military action in the cities if Dubček was not dismissed from his post as First Secretary of the Czechoslovak Communist Party. In the first month of the occupation over seventy Czechoslovak citizens had been killed: Windsor and Roberts, *Czechoslovakia 1968* (1969), p. 123 n.

<sup>193</sup> GA Res. 2395 (XXIII) of 29 November 1968.

<sup>194</sup> GA Res. 2508 (XXIV) of 21 November 1969.

<sup>195</sup> GA Res. 2547 (XXIV) of 11 December 1969.

agreement (e.g. through a United Nations resolution) to the effect that the law applies in all cases of military occupation or of any other situation where armed forces move in and exercise domination or authority outside the internationally accepted frontiers of their State and its dependencies. Some such wording could provide a parallel, so far as occupations are concerned, for what common Article 2 of the 1949 Geneva Conventions already does for international armed conflicts. That is to say, it could help ensure the application of the law irrespective of formal declarations and designations—whether of war or of occupation. However, such a formula still leaves the application of rules dependent on the outcome of complex arguments—not least about recognition of frontiers. An escape from this problem would probably require general acceptance of the idea that certain rules apply equally in internal and international conflicts. Evidence that such an idea is gaining ground can be found: but so far as occupations are concerned there are difficulties in accepting that a set of rules designed for administering foreign territories with their own institutions and laws can really be viewed as equally applicable in all internal conflicts.

The idea of applying the law on occupations on a purely *de facto* basis and irrespective of how a territory is designated has some point, but it also poses some problems. One is that the law may be only applied in part. A possible example is the Israeli application of ‘the humanitarian provisions’ of the 1949 Geneva Convention IV in the West Bank and Gaza. Such an approach can provide a basis for a State to limit the applicability of the Convention in one way or another. There is sometimes merit in asserting clearly that a given territory is subject to the full range of occupation law. A further consideration is that the formal designation of territory as occupied does have substantial practical and legal consequences. For example, the question of responsibility for war crimes often hinges on whether an area is considered to have been occupied. So too do questions relating to the applicability of the existing law of the territory concerned, and to the validity of actions by the ousted sovereign in respect of the occupied territory. For all these reasons, the importance of the designation ‘occupation’ is not likely to disappear.

#### (d) *Can a Single Set of Rules be Applied in Different Situations?*

Granted that occupation can assume many different forms, that the concept is fuzzy at the edges, and that the law relating to occupations is sometimes even applied in situations where the label ‘occupation’ is contentious or rejected, a major question remains. Can a single set of rules really be relevant to a very wide variety of different situations? Is it not a triumph of legal presumptuousness over common sense to assert that the same rules apply to, say, the Nazi occupation of Poland after 1939, the Turkish invasion of Cyprus from 1974 and the Vietnamese role in Kampuchea since 1978?

An intellectually tempting but in the end impractical way of tackling this problem might be to say that the law on occupations should revert to its formal diplomatic origins of 1899 and 1907, and should only be viewed as applicable in belligerent occupations—i.e. those in which one belligerent occupies the territory of another during a war. Many writers have implied, but with greater or lesser emphasis, that the rules apply mainly to belligerent occupation quite strictly defined; and legal writings have focused mainly on this category. As Feilchenfeld said in 1942:

There are, of course, other kinds of occupation, and even other phases and types of belligerent occupation. However, the central body of international law governing occupation problems did not grow up around them; the special rules applying to them are invariably incomplete and controversial, and depend usually on deductions from and modifications of Section III [of the Hague Regulations]; most of them, it will appear, have not been hitherto studied and properly analyzed.<sup>196</sup>

However, any approach which tends to limit the application of the law simply to cases of belligerent occupation has many disadvantages: (a) it goes against a large body of practice and court opinion; (b) it would leave many activities of armed forces outside their own country in something of an international legal limbo; and (c), in any case, belligerent occupations themselves vary enormously in their character and purpose, so such an approach would not only be artificial and arbitrary, but would also still leave us with the original problem that one body of law is applicable to many very different cases. The idea that there is a standard case should not be readily abandoned, and some contemporary occupations (for example, the West Bank and Gaza) are in some ways very close to it. However, a recognition that there is a standard case is not incompatible with an acceptance that the classical conception of belligerent occupation is too rigid, and does not correspond to real life.

A better approach, it is suggested, is to accept that the law on occupations is formally applicable to, and capable of being applied in, a wide variety of situations. Two considerations particularly point to such a course. First, to a large extent the nexus of rights and duties it describes is a body of minimum rules, which any power should be able to follow at any time. Secondly, within the law on occupations there is some allowance for the application of different combinations of rules in different circumstances. For example, the Hague and Geneva conventions contain many provisions permitting the occupant to take certain measures in connection with military operations, or on account of real security needs: where there is no continuing war, or the security situation is more stable, such measures would not be justified. Many other provisions for adjusting the applicable rules to the particular situation may be noted. Some provisions

<sup>196</sup> Feilchenfeld, *op. cit.* above (p. 261 n. 39), at p. 6. See also von Glahn, *op. cit.* above (p. 261 n. 39), at p. 28.

which restrict an occupant's freedom of action quite conspicuously, such as the Hague requirement to respect the existing laws of an occupied country, are subject to reasonable provisos of one kind or another allowing for exceptional circumstances.

The adaptability of the law on occupations is further indicated by the scope which exists for special agreements of various kinds between occupant and occupied. While there is obviously a risk that special agreements may (contrary to 1949 Geneva Convention IV) derogate from the rights of the inhabitants, this is by no means always the case. The legal framework negotiated at The Hague and Geneva is not so perfect that it cannot be improved upon, and it is hardly surprising that in some occupations, especially those of allied territory, there have in fact been significant improvements.<sup>197</sup>

Indeed, while it is certainly based on some clear minimum standards, there is an extent to which it is wrong to conceive of the law on occupations as a single set of rules. True, its basic principles and provisions are set out in concise form in the Hague Regulations and the Geneva Civilians Convention, but to these must be added many other elements, involving State practice, case law and writings, as well as other conventions of a more general character. In addition, the parallel stream of the international law of human rights has not only influenced the recent development of the laws of war in the shape of 1977 Geneva Protocol I, but has also been increasingly recognized as having some applicability to occupations in its own right.<sup>198</sup>

Granted that it is a substantial body of law containing many elements of flexibility, the tendency to regard the law on occupations as applicable only on a *de facto* basis rather than *de jure*, or only partially through some of its provisions rather than as a whole, is bound to be viewed with some scepticism. Even the fact that in special cases some States may feel justified in ignoring or violating some provisions of the law on occupations does not necessarily mean that the law is wrong or useless. In municipal law, and indeed in ethical systems, norms are sometimes violated (occasionally even for good reasons), but they can still be important yardsticks by which the activities of individuals and States may be guided at the time and evaluated later. The condition of international society being what it is, the practical need for a body of law derived largely from the law of war, and providing such a yardstick for the activities of armed forces *vis-à-vis* the inhabitants of foreign territories, is likely to remain.

<sup>197</sup> In the case of *Ministère Public v. Saelens* a Belgian Court Martial held on 25 October 1945: 'The military police of an allied occupying power is not competent to resort to domiciliary search for the purpose of investigating and repressing offences subject to Belgian law . . . On the contrary, the Convention concluded on May 16, 1944 in London between the Belgian Government and allied Governments provided that Belgians who have committed crimes or delicts against allied armies shall be summoned before Belgian Courts Martial . . .': *Annual Digest*, 13 (1946), Case no. 36, pp. 85-6.

<sup>198</sup> Above, pp. 250, 287.



## REVIEWS OF BOOKS

*Le Nouveau droit international de la mer*. Published under the direction of D. BARDONNET and M. VIRALLY. Publications of the *Revue générale de droit international public*, No. 39. Paris: Editions A. Pedone, 1983. 378 pp.

This is another series of essays on the new law of the sea. The first, by de Lacharrière (now Judge of the ICJ) is a review of the role of UNCLOS III, concluding with the comment that, lacking universal support, the Convention cannot pretend to be the new legal order for the sea. The second is a very thorough survey of the different zones of national jurisdiction, and their delimitation, by Lucius Caflisch. The section on shelf-delimitation is excellent, involving a detailed analysis of the decided cases (including some reference to the, as yet, unpublished award between Sharjah and Dubai), and the essay concludes with a discussion of the system for settlement of disputes.

M. Bennouna discusses rights to the exploitation of ocean mineral resources, in an essay which is pragmatic and useful: it disappoints only in the fact that there is no real analysis of the compatibility (or lack of it) between the Convention regime and the rights which non-parties are planning to assert pursuant to a proposed 'mini-treaty'. W. Riphagen writes on navigation under the new law, explaining well the balance struck between the interests of coastal States and the interests of the major maritime Powers in freedom of navigation. This is followed by an essay by Jean Carroz of the FAO on fishery problems under the new Convention. His review of State practice is particularly useful. Yet there is one question to which the answer seems to be elusive. Does a non-coastal State, by virtue of a pre-existing treaty right, have the right to insist on maintaining its fishery within either the twelve-mile limit or the EEZ of another coastal State? Or are such old treaty rights no longer compatible with the new law on coastal fisheries? The modifications of the statutes of the various regional fisheries Commissions suggests a negative answer, but it would have been useful to have seen the issue answered directly.

Claude Douay writes on conservation, and has some interesting observations on the status of the 1969 Intervention Convention in the new law: he also stresses the extent to which national legislation on environmental protection already accords with the essentials of the scheme devised by UNCLOS III. This is followed by an essay by Tullio Treves on the principle of consent, as applied to marine scientific research, and, finally, a very thorough examination of the host of problems relating to who should participate in UNCLOS III by Shabtai Rosenne.

D. W. BOWETT

*Encyclopaedia of Public International Law*. Volume 6: *Regional Co-operation, Organizations and Problems*. Published under the auspices of the Max Planck Institute, under the direction of RUDOLF BERNHARDT. Amsterdam: North Holland Publishing Company, 1983. 381 pp.

The present volume consists of some ninety-two articles, most of them being short, useful descriptions of individual regional organizations. There are, however, various analytical articles of high quality. A number of these deal with boundary disputes. For example, the Belize dispute (Hofmann), US/Canadian disputes (Gunther Handl), US/Mexican disputes (Hans Baade), Guyana/Venezuela dispute (Menon), Indus Water dispute (Rausching), island disputes in the Far East (Chiu), China/USSR disputes (Schweisfurth), and boundary disputes in Africa (Brownlie), in Latin America (Hummer)

and in the Indian subcontinent (Khan). Related to these is an excellent article on the *uti possidetis* doctrine (Jiménez de Aréchaga).

Two other articles merit special mention. These are the articles on American international law (Barberis) and Islamic international law (Khadduri). Both are eminently sensible and highlight the contributions made to international law by concepts developed at the regional level, without attempting to postulate special rules different from those obtaining under general international law.

The European Community also figures prominently in this volume. Apart from a good, descriptive article (Jacobs), there is an excellent article on the relationship between Community law and municipal law (Capotorti) and another on the external relations of the Community (Ehlermann). Certainly the high quality of these volumes is being maintained, and the bibliography at the end of each article is proving invaluable to researchers.

D. W. BOWETT

*The Law of the Sea.* By R. R. CHURCHILL and A. V. LOWE. Manchester: Manchester University Press, 1983. 321 pp. £19.50.

The conclusion of the third United Nations Conference on the Law of the Sea is likely to produce a flood of new books on the law of the sea, but it is unlikely that many of them will be as good as this book. The authors have produced an excellent commentary on the 1982 Convention, but their book is also much more; it analyses earlier treaties (especially the 1958 Conventions) and customary law, and examines the historical, economic, political and scientific background of the law.

After an introductory chapter, the authors discuss in turn the legal status of baselines, internal waters, the territorial sea, straits, archipelagos, the contiguous zone, the continental shelf, the exclusive economic zone, high seas and the deep sea-bed. They then switch from a 'geographical' approach to a 'functional' approach, and examine the various uses of the sea—navigation, fishing, pollution, research and military uses. This change of approach could easily have led to repetition, but on the whole the authors avoid such repetition by skilful use of cross-references. The book ends with chapters on land-locked and geographically disadvantaged States and on settlement of disputes, and there is an appendix showing the widths of territorial sea, exclusive economic zones, etc., claimed by various States.

The style is clear and concise, but one sometimes wishes that the authors had found space to discuss a topic at greater length (e.g. the distinction between claims to exclusive fishery zones and claims to exclusive economic zones, which is mentioned briefly on p. 137). It is also rather confusing to find the discussion of maritime boundaries (i.e. delimitation between opposite and adjacent States) split between the chapters on the territorial sea, the continental shelf and the exclusive economic zone; these passages should have been grouped together in a separate chapter.

The authors say that their book is aimed not only at international lawyers, but also at 'all concerned with maritime affairs'. That may explain the discussion of sources of international law and of peaceful settlement of disputes in the first and last chapters respectively—topics which seem rather out of place in a specialized book like this. Moreover, it is doubtful whether the necessarily brief discussion of these topics is sufficient to enable readers who are not international lawyers to understand the legal issues examined in other parts of the book. But the book's value to international lawyers is beyond question; it deserves to be on every international lawyer's bookshelf.

MICHAEL AKEHURST

*European Human Rights Convention in Domestic Law. A Comparative Study.* By ANDREW Z. DRZEMCZEWSKI. Oxford: Oxford University Press, 1983. xiv + 372 pp. £30.

This book is essentially a useful assessment of the constitutional status of the European

Convention on Human Rights in the member States' domestic systems and a study of the ways in which the Convention's role could be strengthened in these countries. The book does not attempt to cover, although this might have been expected from the title, the ways in which the substantive law of the Convention has been interpreted in those member States which have incorporated the Convention into their domestic law.

The book begins with a description of the Convention's implementation procedures, the nature of the Convention which the author sees as creating a type of European *ordre public*, and the duties of member States in particular under Article 13. The majority of the book is devoted to an assessment of the status of the Convention itself and the findings of the organs created under the Convention in the domestic law of all twenty-one member States. Each State is studied in turn and in so doing the author notes firstly the date of ratification, any reservations and whether that State has recognized the right of individual petition (Article 25) and the competence of the Court (Article 46). Provisions of the constitution are then studied and any case law of that country which clarifies the Convention's status is referred to. Major legislative changes to conform to the Convention are outlined as well as evidence of changes in domestic law as a result of cases decided by the European Court or Commission. For some reason the legal and practical impact of cases decided by the European Court, Commission and Committee of Ministers in domestic law is dealt with in a separate part of the book entailing another survey of each member State in turn and inevitably involving a certain amount of repetition of material contained in the earlier section. Additionally there is a chapter devoted to the possible implementation of the Convention through European Community Law and another on the doctrine of *Drittwirkung*.

Throughout the book the author unequivocally indicates his desire that the Convention be given maximum effect in all member States and in particular that it ought to be incorporated into domestic law. However, the particular danger of incorporation, that interpretation by domestic tribunals may be incompatible with that of the Strasbourg organs, is scarcely dealt with. The problem is only alluded to by the author in his last chapter whilst suggesting a referral system similar to Article 177 of the EEC Treaty. He strongly supports such a system in order to assure uniform application of the Convention which would be a first step towards a European constitutional law. There are, however, three problems with this. First, such a system has already been suggested and rejected and although the author refers to this fact in a footnote, he does not outline the reasons for rejection and how they might be countered. Secondly, such an interpretation might not be able to take into account the particular needs of a country, although some articles would pose less of a problem in this respect than others. Thirdly, the Convention provides only for minimum standards and one would wish to avoid a lowering of standards which might conceivably occur despite Article 60 of the Convention. This last problem would probably be averted, however, by the Strasbourg organs' habit of referring to general European practice in assessing a case and by a teleological interpretation. Nevertheless, a low standard is frequently tolerated; in particular it might be noted that criticisms of the German system of administrative justice frequently resulting in extremely lengthy pre-trial detention is so far limited to a few dissenting opinions in the Commission (*Hätti* and *Haase* cases).

It must be conceded, however, that for the United Kingdom, which does not have constitutionally guaranteed basic rights, incorporation would be a very positive step, and this reviewer would certainly agree with the author that all member States should accept the right of individual petition and the competence of the Court and thus ensure a minimum European standard.

LOUISE DOSWALD-BECK

*The International Court of Justice and some Contemporary Problems: Essays in International Law.* By T. O. ELIAS. The Hague: Martinus Nijhoff, 1983. ix + 374 pp. (including tables and index).

Like Judge Elias's earlier book, *New Horizons in International Law* (reviewed in this *Year Book*, 52 (1981), p. 278), the present volume is a collection of essays on a variety of current legal issues. Although many of the essays have already appeared in print, their collection in a single volume is most welcome, since it makes many of them more readily accessible than had previously been the case.

The volume is divided into five parts. The first and longest of these contains seven papers on the International Court of Justice, two of which, 'Methodological Problems facing the International Court' and 'The Doctrine of Inter-temporal Law', are already well known, although it is interesting to read them in the context of Judge Elias's other thoughts on the work of the Court. The other essays examine some of the problems currently facing the Court and review the recent case law. This review is by no means uncritical. In commenting on the Court's decision in the *Nuclear Tests* cases, Judge Elias accuses the Court of 'shirking its responsibility to the international community', while another essay on the 'non-appearing respondent' (though not as rigorously critical as Sir Gerald Fitzmaurice's article in this *Year Book*, 51 (1980), p. 87) reveals the writer's unease about the manner in which Article 53 of the Statute of the Court has been applied in recent years.

In Part Two, entitled 'International Law and Development', Judge Elias gives us three very different essays which are only loosely linked. There is a short paper on sovereign immunity, reviewing the decision of the Court of Appeal in *Trendtex v. Central Bank of Nigeria* ([1977] 1 QB 529), in which the author, speaking as a former Chief Justice of the Supreme Court of Nigeria, expresses the view that the Nigerian courts would probably adopt the same approach to the relationship of international law and municipal law as that advanced by Lord Denning in that case. This part also contains an essay on 'The work of International Organizations in the Economic and Social Fields' and Judge Elias's interesting address to the American Society of International Law on the law-making process in international law. Part Three contains two short papers on the new international economic order.

Part Four reviews developments in diplomatic law and the law of human rights, with particular reference to the protection of human rights in Africa. In Part Five Judge Elias reviews the cases involving Africa which have come before the World Court from the *Tunis and Morocco Nationality Decrees* case in 1921 to the *Namibia* and *Western Sahara* opinions of the 1970s, in three papers which are often critical of the Court but which end on an optimistic note.

Because this volume is a series of self-contained essays, not a systematic treatment of a subject, it tends to whet the reader's appetite rather than satisfy it. Nevertheless, as an agenda of contemporary issues in international law drawn up by the President of the International Court of Justice it remains of considerable interest.

CHRISTOPHER GREENWOOD

*The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights.* Edited by M. P. FURMSTON, R. KERRIDGE and B. E. SUFRIN. The Hague: Martinus Nijhoff, 1983. viii + 428 pp. f130; \$56.50.

This is a well-written introductory book for domestic lawyers which highlights the ways in which membership of the European Communities and ratification of the European Convention on Human Rights has influenced English law. The book takes the form of twelve essays covering a variety of topics which, as the preface concedes, cannot hope to

form a comprehensive review. The subjects covered range from general topics, such as judicial reasoning and the constitutional problems arising from EC membership, to specific issues such as the effect of EC law on equal pay for women, competition law, company law, immigration law and jurisdiction. The articles on the European Convention on Human Rights include a general discussion on possible incorporation and specific articles on the closed shop, contempt of court and prisoners' rights. Although the scope of the essays varies considerably, the book nevertheless forms a cohesive unit. Throughout these essays one perceives the same thread, that is, the particular problems caused by our idiosyncratic legal system, the lack of a written constitution and the frequently xenophobic attitude of British politicians. In this regard the last chapter of the book illustrates particularly well the result of these peculiarities in that it outlines the extent to which legislation, delegated legislation and administrative rules have had to be changed as a result of cases before the Strasbourg organs, although these changes are generally brought about in the domestic forum without admitting the role of the European Convention! This inward-looking approach is unfortunately slightly reflected in chapter 11 dealing with prisoners and the European Convention in that the authors rely almost entirely on cases brought against the United Kingdom to the exclusion of other relevant cases to illustrate Strasbourg case law in this field. It might also be mentioned that there is an error in this chapter on p. 373 which cannot have been intended by the authors, in that the security classification of a prisoner was held by the Commission to be outside the scope of Article 6 and not within as stated (*Brady* case).

All the essays in this book are very clearly written taking into account the broad policy issues involved. A lawyer without prior knowledge of European law will therefore be able to appreciate the effects of European law on the legal areas studied, and in addition the general effect of the book will be a greater awareness of these treaties with regard to other areas of English law.

LOUISE DOSWALD-BECK

*Cases and Materials on International Law.* By D. J. HARRIS. 3rd edition. London: Sweet & Maxwell, 1983. lii + 810 pp. (including appendices and index). Hardback, £26.00; paperback, £19.50.

It is a pleasure to welcome the publication of a new edition of this excellent book. As in previous editions, the author has drawn on an extremely wide range of materials, and he adds perceptive and thought-provoking comments and questions of his own (some of the questions in previous editions have now been rephrased as comments).

Some sections of this new edition (e.g. the section on title to territory) are almost the same as in the previous edition. Others have been substantially altered; apart from passages added to take account of new developments in the law, most of the alterations seem to be drafting amendments, although once or twice it is clear that the author has changed his mind. For instance, on p. 637 he says that the Vienna Convention on Succession of States in Respect of Treaties is 'best seen as an instance of progressive development rather than codification', whereas on p. 661 of the second edition he said that the corresponding provisions of the International Law Commission's Draft Articles (which the Convention follows pretty faithfully) 'can be taken to reflect customary international law'.

The section on recognition of governments has been rewritten to take account of the adoption of the Estrada doctrine by the United Kingdom and United States, and many of the old English cases on recognition of governments have been omitted. The State Immunity Act 1978 and the *I Congreso del Partido* figure prominently in the section on sovereign immunity. The chapter on the law of the sea has been updated to take account of the 1982 Convention, recent national legislation on sea-bed mining and the *Anglo-French Continental Shelf* arbitration and *Tunisia/Libya Continental Shelf* case. Many new cases have been added to the chapter on human rights, and the section on the role of the United

Nations in relation to human rights has been expanded from ten to twenty-three pages. The sections on expropriation and breach of contract (i.e. breach by a State of a contract which it has made with an alien) have been substantially rewritten and rearranged; greater prominence is given to the arbitrations arising out of Libya's revocation of oil concessions in the 1970s, and less is said about the Harvard Draft Convention of 1961. Several alterations have been made to the chapter on the use of force, including the addition of extracts from the Security Council debates on Argentina's invasion of the Falkland Islands in 1982. (On the other hand, the brief discussion of title to the Falkland Islands on p. 171 adds little to the treatment in the previous edition; and title to the Falkland Islands is still discussed under the heading of conquest, which is misleading, since the United Kingdom has never relied on conquest as a basis of its title to the Falkland Islands.)

Yet, despite all this new material, the length of the main text has been reduced from 775 pages to 747 pages. The author has exercised great skill in omitting or abbreviating various passages. Little of value has been lost, but there are inevitably one or two exceptions. Your reviewer was sorry to observe the deletion of a speech by Castañeda, quoted on p. 459 of the second edition, which dealt with the question of compensation for expropriation of foreign-owned property in the following words:

... There had been differences of opinion on the matter for over a century, as could be seen from the many recorded international cases and precedents. The views of the developed countries, and some of the precedents, were diametrically opposed to the views of the developing countries and to other precedents ... The countries of the group of 77 denied the existence of generally accepted practice on that issue, since the legal precedents and opinion on the matter differed too widely for there to be any real international custom.

It is easy enough to argue, as the arbitrator in *Texaco v. Libya* did, that the General Assembly resolutions of 1973-4 could not change the law on expropriation because they were not supported by a consensus of member States of the United Nations; but, if consensus is needed to change a rule of law, it must surely also be needed for the creation of that rule in the first place, and Castañeda's point (which is probably the best argument that can be put forward against the 'Western' view on expropriation) was that there never had been a consensus in favour of the 'Western' position, because even in the nineteenth century the Latin American States rejected the 'Western' position.

Harris's book is unquestionably the best cases-and-materials book available at present. But that makes it all the more regrettable that his approach is too selective; he says very little about extradition, State succession (except in respect of treaties), many aspects of the United Nations, or the history of international law. The inclusion of a chapter on arbitration and judicial settlement, coupled with the omission of any reference to other methods of settling disputes, gives a very misleading impression of how disputes between States are settled in practice; this is all the more surprising since elsewhere in the book (especially in the first chapter) the author shows considerable awareness of the political background of international law. It is to be hoped that in future editions he will find room (for instance, by cutting some of the ninety-three pages on human rights) for full coverage of the topics which he has hitherto tended to neglect.

MICHAEL AKEHURST

*Yearbook of European Law*. Volume 1 (1981). Edited by F. G. JACOBS. Oxford: Clarendon Press, 1982. viii + 472 pp.

It is a pleasure to extend a warm welcome to this new *Yearbook*, covering European law in a broad sense. It is not limited to the law of the European Communities, although that is the area on which it concentrates: the intention is also to include contributions on other areas of 'transnational law' in Europe, for example, on the European Convention on Human Rights and on other developments in the Council of Europe. As well as articles

within this field, the *Yearbook* plans to publish a series of general surveys of European organizations, and a series of annual surveys of areas of particular interest.

These general aims are effectively achieved in this first volume. Most of the articles are directly concerned with various aspects of Community law: EEC Directives for the harmonization of law (A. J. Easson), self-restraint by the EEC in the exercise of its external powers (G. L. Close), the development of a common regime for fishing (R. Wainwright), the impact of Article 177 of the EEC Treaty on the review of Community action (C. Harding), the retrospective operation of judgments of the European Court of Justice (M. Waelbroeck), pricing policy and Community rules on competition and free movement of goods (D. L. Perrott), and supranationalism and the Community system (J. Weiler). Two articles deal with human rights within a Community context: the protection of human rights in the European Court of Justice (M. H. Mendelson) and the relationship between the Community and the European Convention on Human Rights, and the consequences flowing therefrom for the United Kingdom (J. McBride and N. Brown). Two further articles deal with quite separate, but still European, matters: the role of national provisional measures (or protective measures) within the context of the conflict of laws and the 1968 Brussels Convention on Jurisdiction and Enforcement in Civil and Commercial Matters (L. Collins), and the European Convention on the Suppression of Terrorism (M. Wood).

The general survey of European institutions begins in this volume with the European Patent Organization (J. C. A. Staehelin) and the annual surveys of areas of particular interest cover the external relations of the European Community (B. Meynell), competition law (I. S. Forrester and M. Siragusa), decisions of the European Court of Justice relating to the Court's jurisdiction (E. Freeman), the Council of Europe (H.-J. Bartsch), and the European Convention on Human Rights (A. Drzemczewski). A review of books completes the main body of this volume.

A *Yearbook* such as this, which treats European legal affairs on such a broad basis and thereby helpfully sets particular developments within a wider perspective than is often the case, is a valuable addition to the available literature. The articles and surveys make authoritative contributions in their respective fields. Altogether, the range, scholarship and presentation of this first volume suggest that the series will be indispensable for all those actively interested in European legal matters, and will also be a valuable source of specialist learning for those whose concern with 'transnational' legal developments in Europe may be more occasional.

A. D. WATTS

*Vertrag und spätere Praxis. Zum Einfluß der Praxis auf Inhalt und Bestand völkerrechtlicher Verträge. Treaty and Subsequent Practice in International Law* (English Summary). By WOLFRAM KARL. Berlin, Heidelberg, New York: Springer-Verlag, 1983. xx + 438 pp. DM 98.

This book has been awarded the Paul Guggenheim prize 1983. Such glittering distinction, though, should not distract anyone with a professional interest in international law from reading it. In fact, this book should not be reviewed at all but merely declared compulsory reading. It cries out for an English translation, the unusually detailed English summary notwithstanding.

Scelle's introductory motto that 'l'application elle-même des traités n'est, on le sait, qu'une révision continue' (*Théorie juridique de la révision des traités* (1936), p. 11) heralds the fundamental theme of this book: The conclusion of a treaty constitutes the release of its polysemy, which is itself being continuously transformed by subsequent practice, invariably based on attempts to elicit meaning from treaty provisions.

'Subsequent practice' as a means of interpretation has for a long time been acknowledged by courts and was retained by the Vienna Convention on the Law of Treaties (Article 31 (3) (b)). However, when interpretation appreciably departs from the original

text of a treaty, it may amount to substantial modification or even abrogation. The central question, therefore, is whether such factual and informal practice is apt to change the legal relations created by the treaty and particularly whether it may effect a modification or termination. To this question the Vienna Convention offers no clear answer. Even if it did, it would have relevance only for treaties concluded after the entry into force of the Vienna Convention (Article 4). Given the present number of ratifications it would, therefore, in all probability be relevant for no more than 6 per cent of the treaties potentially governed by the Convention (p. 299). Its actual relevance tends to be further diminished by the fact that questions of 'modification' and 'termination' by way of practice are usually only raised after a considerable period of time. Hence the evident importance of the proposed investigation of customary international law in search of answers to these questions.

Part 2 of the book provides conceptual prolegomena by defining the legal framework for the operation of subsequent practice. Following established doctrinal practice, Karl reviews systematically the terminology, the object, form, extent, grounds and methods of various kinds of 'modification' and 'termination'. Conciseness in the presentation of such necessarily technical matters enhances their grasp and, fortuitously, mitigates inevitable tedium.

The treaty is qualified as the most important source of international law in practice (p. 12). Doctrinal opinions that a treaty merely or primarily constitutes a source of legal obligations under international law are not mentioned (e.g. Cheng, 'The Future of General State Practice in a Divided World', in MacDonald and Johnson (eds.), *The Structure and Process of International Law* (1983), p. 527; Parry, *Sources and Evidences of International Law* (1965), p. 2). However, by stressing their flexibility and infinite variety of forms, Karl rightly guards against certain fashionable trends to enhance some kind of world order by over-enthusiastic extrapolation of treaty regimes. Such a standpoint, however, might perhaps have best been confirmed by the use of the term 'provision' (*Vertragsbestimmung*) instead of the slightly misleading 'norm', even though 'norm' is used to mean rights and obligations (p. 14). Many of the refined distinctions of modes of interpretation in relation to treaty modification and termination are shown as being conceptual constructions based on legal literature but hardly reflected in practice which knows no clear dividing line between interpretations and law creation, nor even between legal interpretations and politically motivated deviations from a treaty text disguised as interpretation.

Another part of this section deals with derogation in general and its operation between treaties and customary law. Maxims for derogation may be useful devices for solving conflicts between treaty provisions (Articles 30 and 59 of the Vienna Convention), one of which will then be found inoperative. Genuine conflicts, by contrast, that is those not susceptible to harmonizing interpretation remain unresolved and require synoptical interpretation of the competing instruments. Higher law, such as *ius cogens* and United Nations Charter obligations, are unaffected by derogation (Article 103 of the United Nations Charter, Article 30 (1) of the Vienna Convention); breaches of prohibitions to derogate are unlawful only as between the parties to a treaty but do not render the offending instrument void (Articles 30 and 41). Derogating treaties raise questions as to form and participation. There is no requirement as to form, and consent is the governing principle regarding participation.

Of greater significance is Karl's analysis of the derogating effect of customary law with respect to treaties. Relevant utterances from States are not confined to those of the legislature and organs habitually representing the State in foreign relations. Courts and administrative agencies too are included. Kelsen denied that customary international law could derogate from treaties since the existence of a new *opinio iuris* implies that the treaty norm lacks effectiveness and hence validity. Karl rightly points out, however, that from a practical point of view anyone called upon to apply an instrument will be confronted with conflicting legal norms. If harmonization fails, derogation will be found unobjectionable. Still, there is no automaticity as all will depend upon the individual circumstances.

Subsequent practice regarding a particular treaty is discussed in Part 3. Its main legal function is evidenced by both its unequivocal acceptance by the doctrine and its massive presence in pertinent case law. Two constitutive elements are distinguished: The practice must have developed after the conclusion of the treaty concerned and must specifically relate to it. Excluded are, therefore, general practice in *pari materia* and between parties to the treaty but with respect to other treaties. This latter restriction would eliminate from consideration such instances as arose in the *Wimbledon* case. While its acceptance as a factor in interpretation has never been in doubt, attitudes as to the proper construction and weight to be placed upon subsequent practice have differed considerably. Regarded at first as evidence of the parties' intention at the time of the conclusion of the treaty, it was later freed from such historicizing encumbrance to become an independent factor of interpretation associated with the dynamic approach to treaty interpretation. Such practice may either exhibit the parties' common current understanding of the treaty or appear detached from the intentions and expectations of the parties as an objective factor.

Central in the first aspect is the *consensus ad idem* whether in the form of the 'contemporary shared expectations' (New Haven approach, Judge Dillard in the *Namibia* advisory opinion, *ICJ Reports*, 1971, pp. 152 f.; numerous municipal cases in which courts had to interpret international treaties), as actual preferences of the parties or, on the basis of a consistency argument, as estoppel so amply illustrated in judicial practice.

Under its second objective aspect, subsequent practice may be viewed as embodying the social reality in which the treaty must realistically be seen, 'its operation in actual practice and in the light of the revealed tendencies in the life of the Organizations' (Lauterpacht, separate opinion, *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa*, *ICJ Reports*, 1955, p. 67), or its 'emergent purpose' (Fitzmaurice). Further facets of this perspective mentioned by Karl are subsequent practice approximated to precedents of varying weight and as a guideline for uniform application.

This is followed by a meticulous analysis of subsequent practice under the Vienna Convention. Karl notes the relative openness of the Convention's approach to interpretation and demonstrates that under Article 31 (3) (b), subsequent practice is both a primary, not supplementary, and party-oriented, i.e. subjective, factor of interpretation. From such examination of subsequent practice as a factor of interpretation and, on occasion, even modification, Karl proceeds to a painstaking scrutiny of instances in which the impact of subsequent practice is even more decisive whether upon the validity or the content of a treaty. Thus, subsequent practice may entail tacit ratification (in principle recognized by the ICJ in the *North Sea Continental Shelf* cases, 1969), tacit acceptance of a reservation (Article 20 (5) of the Vienna Convention), tacit validation (Articles 8, 45), tacit prolongation of or succession to treaties (1978 Vienna Convention on State Succession) and tacit termination and suspension. The content of a treaty may be affected by subsequent practice acting either as an authentic interpretation or as a modification.

This leads to the central Part 4 on the modification or termination of a treaty by subsequent practice. Karl discusses first examples of recent practice—e.g. the *Abu Daud* case in connection with the German-French extradition treaty 1951, and the Norwegian departure in 1976 from its previously consistent cautious interpretation of provisions on demilitarization contained in the Spitzbergen Treaty 1920—from which he then elicits overt deviation from the treaty concerned as their common trait.

However, may informal processes characteristic of subsequent practice modify or terminate validly concluded treaties? This central legal question is investigated empirically on the basis of State practice, judicial precedents and legal writings as evidence of customary international law. In fact, subsequent practice, *desuetudo*, derogating custom, tacit abrogation, *de facto* revision and similar notions revolve around the same central problem: the question of the modification or termination of formal treaties by subsequent practice. The empirical evidence marshalled by Karl whether from old or contemporary arbitral awards (*Yuille, Shortridge & Co.* 1961; *French-American Air Transport* case,

1963), decisions of the PCIJ and ICJ (*Serbian and Brazilian Loans* cases, 1929; *Honduras v. Nicaragua*, 1960; *Temple* case, 1962; *Namibia* case, 1971), individual opinions (Badawi in the *Asylum* case, 1950; Lauterpacht in *South West Africa Voting Procedure* case, 1955; Spender in *Certain Expenses*, 1962; joint dissenting opinion in the *Nuclear Tests* cases, 1974), or municipal courts amply corroborates the contention that treaties may in principle be modified or terminated by subsequent practice. How is such convincing practice to be explained in law? Karl avoids tempting short-cuts: aware of recent trends to slip various law-creating agents into a 'softened-up' concept of 'source of international law', he notes that subsequent practice shares common features with both treaties (origin and effect) and customary law (informality) and consequently proceeds to explain and justify subsequent practice on the basis of accepted standards.

Subsequent practice which is consistent and carried out by *opinio iuris* may modify or terminate an underlying treaty as customary law. The vast majority of writers accept this. Its most important form is *desuetudo*: non-application over a period of time. The time factor as in customary law is an important but relative factor; non-application must be accompanied by *opinio iuris* to be effective.

A more common explanation for the capacity of subsequent practice to modify or terminate a treaty is a tacit agreement by the parties on the basis of acquiescence. Cases such as that of the Peace Treaty of Brest-Litovsk in the German Reichsgericht (1925), the *Temple* case, and the already mentioned *French-American Air Transport* arbitration, influenced the works of the International Law Commission on the codification of the law of treaties in whose Draft Article 38 of 1966 it was faithfully reflected. Although the Vienna Conference rejected Article 38 *in toto* it did not in so doing, according to Karl, register general refusal to accept that subsequent practice may modify treaties. Many objections to its retention were of a drafting nature or stemmed from a desire to adapt international law to municipal law: legal uncertainty was to be avoided, the generally expected attendant disadvantage in undermining Parliament's prerogative to conclude important treaties. Whereas in Article 54 (b) the Convention provides for termination by subsequent practice of the parties, it contains no answer to the question of modification of treaties by subsequent practice. Nevertheless, practice and writers continue to admit such function under present customary law.

A third conceivable explanation for the binding effect of subsequent practice may be found in such principles of law as prescription and estoppel. Acquisitive prescription is invariably linked to territory and extinctive prescription—non-execution of a right during a long lapse of time—while admitted by some writers (e.g. McNair), has not been accepted in court practice as a valid cause of treaty termination but merely with respect to single rights claimed under a treaty. Estoppel, stripped of its more technical propensities possessed in Anglo-American usage, has without any doubt become an independent principle in international law (*Argentina-Chile Frontier* case, 1966; *North Sea Continental Shelf* cases, 1969) and as such would appear applicable to representations of fact as well as to the content of the law. A State would, consequently, be estopped from denying that it had made a clear and unambiguous statement or representation regarding the legal situation if, relying on this representation, another subsequently changed its position in good faith to its own detriment. Since conclusive conduct may also induce estoppel—e.g. consistent application of a treaty in a certain way or non-application—subsequent practice may thus be seen as raising an estoppel and serve to explain modification or termination. However, estoppel is based on one-sided communication of a statement or representation (*Honduras v. Nicaragua*, 1960; *Temple* case, 1962). Karl, therefore, finds that 'tacit agreement' provides a better explanation, as it is more closely expressive of the reciprocating and 'weaving' process typical of subsequent practice.

Part 5 of the book addresses the question whether special treaty clauses on amendment or termination exclude informal modification. Karl denies this by showing that, with the possible exception of the constituent instruments of international organizations, the purpose of such clauses is to facilitate amendment not to prevent the more cumbersome

traditional alternative based upon the consent of all the parties (Article 54 (b) of the Vienna Convention).

In the final Part 6, Karl reverts to the Vienna Convention. While dealing with subsequent practice in connection with interpretation (Article 31 (3) (b)), stipulating formal methods for modification (Articles 39 to 41) and implicitly covering subsequent practice as a form of termination by agreement (Article 54 (b)), the Convention fails to cover modification by subsequent practice. Whether by not regulating it the Convention excluded modification by subsequent practice or simply abandoned it to other sources is a difficult question of interpretation. For this question, the tools of Articles 31 and 32 of the Convention are used. After a careful analysis of the terms, the context, the object and purpose of the Convention and of its preparatory work, Karl concludes convincingly that modification of treaties by subsequent practice is to be considered a question 'not regulated by the provisions of the present Convention' (para. 8 of the Preamble). Under customary law which, consequently, remains applicable, abundant affirmative practice has been shown to exist.

This book is flawlessly produced: there are no conspicuous typographical errors. A detailed index of subject-headings and a register of digested literature and subject-matters as well as separate tables of cases and treaties complete the volume.

This is a book on a very difficult and complex subject. It is tightly and cogently reasoned, well documented, and immensely readable. It is one rare example of a German legal style which is concise, concrete and exact as well as free from obscurities of expression. The rather lengthy account of conceptual instruments and of relevant legal literature, although merely instrumental and critically presented, is a little tedious. However, being a habilitation thesis, such exercises are possibly unavoidable. Brilliance is unjustly equalled with brevity. It is a scientific book written with an acute sense for the economy of words. Practitioners can ill afford to ignore it. Its masterly presentation of a wealth of material may perhaps occasion a sense of *déjà-vu*. But would this not exactly prove its utility for practice?

FRIEDL WEISS

*Human Rights, European Politics, and the Helsinki Accord: The Documentary Evolution of the Conference on Security and Co-operation in Europe 1973-1975.* Volume 1. Edited by I. KAVASS, J. GRANIER and M. DOMINICK. Buffalo, New York: William S. Hein & Co., Inc., 1981. xx + 419 pp.

This book is the first of six volumes which comprise a record of the most interesting documents from the Conference on Security and Co-operation in Europe which took place between July 1973 and August 1975. Volume i is devoted to the initial session which took place between 3 and 7 July 1973, and volume ii reproduces selected unofficial journals from Conference committees. Volumes iii-v contain records from the committees and working groups which dealt with the three 'Baskets': Basket I, 'Questions relating to Security in Europe' (vol. iii); Basket II, 'Cooperation in the Fields of Economics, of Science and Technology, and of the Environment' (vol. iv); and Basket III, 'Co-operation in Humanitarian and other Fields' (vol. v). Finally, volume vi reproduces the Final Act and the 'Verbatim Records' of the delegates' closing speeches.

This review is, however, limited to volume i which is principally devoted to the reproduction of the opening speeches by the Foreign Ministers of the thirty-four participating States and by Mr Waldheim, then Secretary-General of the United Nations. The volume begins by listing the Final Recommendations of the Helsinki Consultations, which are in effect the rules of procedure for the Conference and were the product of negotiations which took place in Helsinki from November 1972 to June 1973. The most interesting part of these recommendations is the section entitled 'Agenda and the Related Instructions' which is subdivided into the three 'Basket' headings. Under the first heading, paragraph 19 is particularly relevant as it is referred to in several of the Ministers' speeches

and lists the principles which should guide the mutual relations of participating States and read somewhat like the 'ten commandments' for States! The second heading includes specifically such topics as commercial exchanges, industrial co-operation, science and technology and environment. The third heading lists in particular the facilitating of human contacts, freer and wider dissemination of information, and co-operation and exchanges in the fields of culture and education.

The speeches themselves generally refer to these principles and areas for co-operation with approval, and apart from the rhetoric there are quite a number of very specific proposals, many of which are reproduced in official proposals which are to be found at the end of the volume. The Ministers' speeches remind one forcefully that this Conference began in the heyday of *détente*, SALT 1 having just been concluded between Nixon and Brezhnev, the MBFR talks about to open in Vienna and the two Germanies about to be admitted to the United Nations. The records suggest that the atmosphere was one of optimism: as Mr Mintoff of Malta put it, 'The Iron Curtain is now torn asunder'! Yet beneath this façade of agreement, certain areas of conflict emerge from the speeches, for example, although Mr Gromyko mentioned human rights protection and self-determination in general terms, the Ministers of the United Kingdom, Austria and the United States particularly stressed that the Conference must have a beneficial effect on the actual daily lives of the people of Europe. The Netherlands in an outspoken speech stated that States must be free to change their socio-economic system without outside interference.

The only shortcoming of this collection of documents is that there is virtually no commentary other than the introduction, which describes the layout of the six volumes. Of particular interest, for example, would have been a brief description of the fate of certain State proposals which could have been included either together with the proposals or in an extra volume. As it stands it is, in effect, a collection of the *travaux préparatoires* to the Final Act and as such, of course, a valuable documentary history.

LOUISE DOSWALD-BECK

*Competition Law of Britain and the Common Market.* By VALENTINE KORAH. The Hague: Martinus Nijhoff, 1982. xxviii + 352 pp. (including appendix, bibliography, tables and index). £35.50.

In the field of the competition law of the European Communities, Professor Korah has for some years occupied a dominant position. Her authority is based only in part upon her concise introductory book and upon her contributions to legal periodicals, prolific, varied and vigorous as they are. To an equal or greater extent it is based upon her longer book, originally published in 1968 under the title *Monopolies and Restrictive Practices*: and now entering its third edition.

Although this book ranks by any standard as a leading work on its subject and is by no means abbreviated or introductory, it is not in any traditional sense a *magnum opus*. The author states in her preface that she has 'attempted to stimulate and help understanding rather than to produce a comprehensive treatise' (which, she adds characteristically, 'would have been long and costly'). She writes in an uncomplicated and occasionally colloquial style, dispensing with footnotes altogether and illustrating her points with examples, based on real events or on realistic hypotheses. She has kept her use of jargon to the minimum, but has included a glossary of technical terms for the uninitiated. Each chapter is divided into sections with short explanatory headings. The result, with one reservation, is that the book can be read without undue effort from cover to cover but is equally suitable for rapid consultation on specific topics. (The reservation that must be added is that the publishers' standards of typesetting are low, particularly for a book of this price.)

The reader who is not unduly distracted by this detail will find the introductory chapter a

paradigm of concision and clarity. It comprises an explanation of the function of anti-trust legislation in general and is followed by three chapters, making up Part One of the book, devoted to the United Kingdom's law on monopolies and mergers. These have been substantially revised since the second edition of the book, particularly in view of the Protection of Trading Interests Act 1980 and the Competition Act 1980 as well as the decision of the House of Lords in *Hoffman-La Roche v. Secretary of State for Trade and Industry*. Part Two is concerned with restrictive trade practices and resale price maintenance. Much of this Part consists of a critical evaluation of the Restrictive Trade Practices Act 1976, together with the Resale Prices Act and the Restrictive Practices Court Act, although there is a new chapter four, dealing with both anti-competitive practices and the extraterritorial effects of foreign competition law. The author concludes that the widespread satisfaction with this legislation is misplaced. In her view, agreements between competitors to fix prices, divide markets or boycott unauthorized dealers are very likely to harm the economy and should be made criminal (p. 181).

For many readers, as for this reviewer, the principal interest in the book will lie in Part Three, entitled 'The Common Market'. This begins with a chapter on restrictive agreements, consisting of four introductory sections, designed to set Article 85 of the EEC Treaty in its context, followed by fifteen sections, each devoted to a phrase or concept appearing in Article 85 itself. The next chapter deals with Article 86 in a similar fashion. There follows a chapter on the enforcement of the competition rules. Thus, the essence of Community competition law is covered in three chapters or about forty pages of text: a relatively small proportion of the book, given the importance and complexity of the subject. There is then a chapter on intellectual property rights and the free movement of goods, followed by a long chapter entitled 'Some Kinds of Common Commercial Contracts Considered'. Many will find the latter the most stimulating and valuable part in the whole book, since it explains how a synthesis is to be achieved of national and Community law in matters affecting competition. In this chapter particularly Professor Korah makes use of her knowledge of economics and of American material, in order to broaden the reader's perspective.

The book ends with a conclusion, from which the reader is left with a sense of ambivalent dissatisfaction with the present law. According to the author, 'The U.K. legislation gives a high priority to the liberty of the subject to do anything, unless it is clearly unlawful. The Community legislation has given a higher priority to preventing the division of the Common Market and the restriction of competition within it, even though the Commission has insufficient staff to examine agreements quickly and in depth . . . There are many areas where it is not possible to give firm advice . . . although fines have been imposed for conduct that was not clearly illegal at the time only in one or two cases' (p. 286).

It is no criticism of Professor Korah's book, but rather a testimony to the volatile nature of its subject, that many of the points on which the book offers speculation or criticism have recently been addressed by the judiciary. In this sense, many of the comments in Chapter Four on the Protection of Trading Interests Act have now been overtaken by the decision of the House of Lords in the *Laker Airways* case; and much of Chapter Eleven, on the enforcement of Community competition law, has been superseded by the *A.M. and S.* case and the *Pioneer* cases.

Clarity, liveliness, authority, breadth of perspective: such are the qualities of this outstanding and well-established work. If the reader is apt to share with some critics of a previous edition of this book a sense of regret that Professor Korah's work is not an encyclopaedic treatise, replete with detail, this is because the existing textbooks on European Competition law, in the English language, are few in number and either uneven in quality or out of date. In achieving its stated objects, this book succeeds admirably.

RICHARD PLENDER

*International Law of State Responsibility for Injuries to Aliens*. Edited by RICHARD B. LILlich. Charlottesville: University Press of Virginia, 1983. xiii + 412 pp. \$35.

This collection of essays, introduced by a foreword from the hand of Professor Bishop, has grown out of the work of a panel created by the American Society of International Law. It is not intended to be a comprehensive treatise but a good number of central issues receive substantial treatment and the value of the volume is enhanced by the richness of the source references.

The collection begins with a general survey by Professor Lillich which chronicles the historical development and relates the classical elements to contemporary trends. There is much of interest here and a fruitful broad view, but some reservations are called for. As always in the North American literature, the view is foreshortened in two ways. First, the earlier literature (apart from Borchard) is ignored. Secondly, the national treatment concept is ascribed exclusively to Latin America. The fact is that the pre-1940 picture was much more mixed even in European doctrine and practice. The alignment of opinion at the Hague Codification Conference of 1930 is revealing in this respect. In another connection the writer approves the work of the International Law Commission concerning 'liability for lawful acts', although this lacks an adequate technical basis.

A particular characteristic of the collection as a whole is the readiness of the contributors to stand back from the conventional materials, to engage in speculation on future developments and to impose idiosyncratic types of analysis. This element is exemplified by Covey Oliver's study of legal remedies and sanctions (with particular reference to the domestic forum) and the wide-ranging examination by Burns Weston of the relation between expropriation law and the New International Economic Order.

Professor Gillian White contributes an excellent piece on creditor and contract claims, which is original and marked by careful scholarship and clarity of expression. The text is supported by a valuable set of references. The result is one of the best contributions to the difficult subject of 'contract claims' in international law to appear for a long time.

The remaining studies deal with various aspects of State responsibility and diplomatic protection. George T. Yates III gives an account of recent practice concerning treatment of aliens (apart from the issue of expropriation) and, not very elegantly, includes a section on war claims. Admissibility of claims is the subject of Christopher Ohly's essay, which covers familiar ground. Dean Christenson examines the difficult area of State responsibility concerned with the attribution to the State of the conduct of private persons. The volume closes with a very tentative study by Professor Fatouros of the application of the principles of State responsibility to multinational corporations, which are here called transnational enterprises. It is a pity that more attention was not given to justifying the view expressed here that such enterprises are 'qualitatively different' from 'more traditional corporations'. It may be doubted whether new doctrine will be able to overcome the perennial problems of applying legal concepts to complex states of fact.

IAN BROWNLIE

*Law and the Cultural Heritage*. By P. J. O'KEEFE and L. V. PROTT, with a Foreword by Henry Cleere. Abingdon, Oxon.: Professional Books Ltd., 1984. xxvii + 434 pp. Hardback, £23.00; paperback, £14.95.

It is axiomatic that law is a continuum that does not exist in a vacuum, but which is in a constant state of flux, growing and diminishing in relation to such various factors as new municipal and international legislation, political alliances and media exposure. All of these are significant factors which have contributed to the rapid growth of available material concerning law and art. The year 1984 has seen debates in Parliament involving the repatriation of the Parthenon friezes to the Greek Government, and with these debates

comes the first volume in what promises to be an extremely significant series in the field of art and the law.

O'Keefe and Prott's book is the first full-length study since Barnett Hollander's treatment of the subject in his 1959 text (*The International Law of Art*). This, of course, was written before the passage of the 1970 and 1972 UNESCO Conventions concerning cultural property as well as before the decision in *United States v. McClain*, 545 F. 2d 988 (1977); 593 F. 2d 658 (1979). The present work is written with the benefit of their effects. In volume i of this intended five-volume *magnum opus*, the authors are concerned with objects which are found rather than created and therefore their work is heavily slanted towards the protection of the archaeological heritage.

The authors could not have chosen a better subject for their erudition, for cultural heritage is a concept of inherent ambiguity. As the authors concede (p. 8): 'It would be useful if there were a generally accepted definition of "cultural heritage" or "cultural property" in these instruments. Unfortunately this is not the case . . . it may not at this stage, be possible to achieve a general definition suitable for use in a variety of contexts.' O'Keefe and Prott accept that this problem does exist and they examine the ways in which international and national legal institutions must develop if they are to continue to meet the needs of protecting the archaeological heritage of mankind.

One thing must be said about this book: it omits nothing. All facets of the subject-matter are discussed. The subject is considered comparatively as well as historically. The cases and literature have been thoroughly researched, digested, summarized and criticized where appropriate. The treatment of international legislation deserves, in this reviewer's opinion, more than the ten pages that it is allotted. In addition, a more thorough attempt at 'framing' and 'interpreting' (pp. 149-50) a definition of the archaeological heritage would have been welcomed, especially in light of the authors' earlier comments (p. 8).

An immense amount of research and time has obviously been put into this work, and I am sure that its value will be recognized by legislators, lawyers, archaeologists and administrators. Its style is clear without becoming so elementary that it becomes useless, thereby broadening its appeal to laymen and lawyers alike. The reference system used in the text is the method used in the natural sciences rather than the more complex method used in legal treatises. The bibliography is thorough and complete. The second volume of what is destined to become the acknowledged classic in its field is eagerly awaited.

RICHARD JACOBS

*Antarctic Resources Policy: Scientific, Legal, and Political Issues*. Edited by FRANCISCO ORREGO VICUÑA. Cambridge: Cambridge University Press, 1983. iv + 335 pp. £32.50.

The question of jurisdiction over the world's coldest continent has become a hot issue in international law and politics. Just how important it is, can be seen in the temperature of the debate this past winter in a series of letters to the editors of *The Times*.<sup>1</sup> The exchange began on 4 February, with Evan Luard deploring the efforts of the Antarctic Consultative Parties to negotiate a regime to govern mineral exploitation, at the same time as the United Nations Secretary-General had been given a mandate to conduct a comprehensive study of Antarctic issues. Mr Luard asked, 'under what right can these 16 countries (the Consultative Parties) dispose of the resources of this area . . . It is not at all clear what is the basis in international law under which they can claim to exercise control over the resources of the area.'

The letters that followed did not address the question directly. Indeed, it is such a difficult one to answer that it may be best simply to continue the example of the Antarctic

<sup>1</sup> *The Times*, letters to the Editor by Evan Luard, 4 February 1984, by David J. Bederman, 8 February; by Jeff Myhere, 13 February; by David McTaggart, 16 February; by Sir Donald Logan, 23 February; by Evan Luard, 17 March; by G. de Q. Robin, 23 March.

Treaty by side-stepping the legal quagmire and adopting pragmatic solutions to the management of a very problematic territory. Since in law, the Antarctic treaty, which governs activities on the continent, is binding only upon States party, non-parties are theoretically free to do whatever they wish in terms of research, exploration and exploitation of Antarctica. However, in practice, States respect the *de facto* control of the sixteen Consultative Parties and either refrain from activities in Antarctica or accede to the Treaty if they wish to become involved.

The question of jurisdiction over Antarctic resources has arisen anew, with an urgency that cannot be disregarded, because it is believed by some that Antarctica is a frozen treasure-trove of mineral riches ripe for the taking; because the question of sovereignty may determine who will benefit from those riches; because the law of the sea negotiations have been concluded;<sup>2</sup> and because access to mineral resources is seen by many States as a panacea for various ills, both real and imagined.

Following the example of the sea-bed beyond the limits of national jurisdiction having been declared the common heritage of mankind, some Third World States are calling for Antarctica to be 'internationalized' by having it, too, declared a common heritage territory. Of course, they hope that by so doing, the economic benefits of any future mineral exploitation will be available to themselves as well as to Consultative Parties. Nevertheless, although Antarctica was placed on the United Nations agenda in 1983, Malaysia and her supporters were not successful in obtaining a resolution on the common heritage issue. A counter-campaign by the Consultative Parties resulted in a resolution adopted without vote requesting the Secretary-General to prepare a study of Antarctic issues for submission to the 1984 session of the General Assembly.<sup>3</sup>

Because the Antarctic question involves scientific, technical, economic, political and legal elements that are inextricably intermingled, an inter- or multi-disciplinary approach to its study is inevitable. These complexities are reflected in the essays found in the book under review: *Antarctic Resources Policy: Scientific, Legal and Political Issues*. Not only are the twenty-three papers written by experts from a wide variety of fields, but also most of them cross subject-matter boundaries, so that scientific articles touch on legal and political considerations and vice versa. This results in a certain degree of repetition and overlap, but the comparison of different views and approaches is on the whole quite fascinating.

*Antarctic Resources Policy* is a collection of contributions prepared for the Conference on Antarctic Resources Policy organized by the Institute of International Studies of the University of Chile in the Antarctic Station Teniente Marsh, 6-9 October 1982. This was the first international conference held in Antarctica. Since its publication in 1983, the book has become the standard, scholarly work on the subject.<sup>4</sup> Recent developments have rendered older works obsolete,<sup>5</sup> and, in fact, much has happened even since publication of the book under review. Nevertheless, some events, such as consideration of Antarctica by the United Nations, were anticipated by conference participants.<sup>6</sup>

After an introduction by the editor, Part One deals with the state of Antarctic knowledge and experience; Part Two with the policy for conservation of living resources; and Part

<sup>2</sup> The United Nations Convention on the Law of the Sea was opened for signature on 10 December 1982. Mr Beeby suggests (p. 197) that since developing countries are likely to receive few economic benefits from deep sea-bed mining, their attention will be increasingly attracted by the supposed wealth in the Antarctic continent. See also the paper by Keith Brennan (on p. 225), and Part Four.

<sup>3</sup> UN Doc. A/C. 1/38/L. 32 (15 December 1983); Draft Resolution in UN Doc. A/C. 1/38/L. 80 (28 November 1983).

<sup>4</sup> For example, the book under review has been recommended by the Science Adviser, Canadian Department of the Environment, as the authoritative, scholarly work on the subject.

<sup>5</sup> For example, *The New Nationalism and the Use of Common Spaces: Issues in Marine Pollution and the Exploitation of Antarctica*, ed. Jon Charney, while excellent in many ways, is several years out of date.

<sup>6</sup> Chapter 16 by Keith Brennan, on p. 225; chapter 14 by C. D. Beeby, p. 196.

Three with the policy for exploration and exploitation of mineral resources. Part Four relates issues on Antarctica to the law of the sea, while Part Five ponders the policy for Antarctic co-operation. The impulse for the discussions clearly came from the pressing need to formulate a mineral resources policy and the heart of the book is therefore to be found in Part Three, most particularly in the papers by Mr Beeby and Ambassador Brennan.<sup>7</sup> Keith Brennan was a major figure in the Law of the Sea Conference and his contribution at the Antarctica meeting elicited much admiration and provoked concerned debate. A draft by Mr Beeby, who is Assistant Secretary, Ministry of Foreign Affairs of New Zealand, is said to have formed the basis for negotiations by the Consultative Parties for a new minerals regime in Antarctica.<sup>8</sup> Taken together, the various parts and chapters of the book provide a comprehensive view of the situation in Antarctica, from the history of its development to prospects for co-operation in the future.

Following the scientific success of the International Geophysical Year in 1959, twelve States joined together in signing the Antarctic Treaty, which came into force in 1961, and which continues into perpetuity, except for the possibility of a review conference in 1991 to consider amendments to the Treaty.<sup>9</sup> The Treaty provides for a kind of management of Antarctica by signatories in consultative meetings held every two years. Although the Treaty is open to accession by any interested State, only those who have engaged in substantial scientific research may be admitted as new Consultative Parties. Poland and the Federal Republic of Germany were so admitted in 1977 and 1981 respectively, and India and Brazil were accepted at a special Consultative meeting held in Canberra on 12 September 1983.

The framework of the Treaty provides for:

- (a) de-militarization and de-nuclearization of the continent;
- (b) suspension of all territorial claims;
- (c) freedom of scientific research and international co-operation to that end;
- (d) protection of the Antarctic environment.

Because the terms of the Treaty are general and because the issue of natural resources is not dealt with, the Consultative Parties have found it necessary to expand the treaty system with series of recommendations adopted at consultative meetings, and with two treaties associated with, but distinct from, the Antarctic Treaty itself.<sup>10</sup> The treaties on seals and on living resources are open to all States, provided that they accept Article IV—the suspension of territorial claims—of the Antarctic Treaty. In the view of many observers, only the adoption of a regime governing mineral resources is necessary to complete the Antarctica Treaty system.

The evidence presented in the book leads one inevitably to the conclusions that: (a) it is not known whether or not there actually are valuable mineral resources present in Antarctica; (b) even if there are, because of technological and economic constraints, it may be several decades before they can be exploited, and it is most likely that they will never be exploited at all. These facts are accepted by the Consultative Parties, and were argued at

<sup>7</sup> Referred to in chapters 14 and 15. The reviewer's only complaints about this book are editorial in nature. Chapters 14 and 15 refer to Ambassador Brennan's ideas in chapter 16. It would seem that the order of the chapters might have been improved.

<sup>8</sup> See letter by Jeff Myhere to *The Times*, 13 February 1984.

<sup>9</sup> Antarctic Treaty, Article XII (2). An inexcusable fault in this book is the absence of a text of the Antarctic Treaty, of the Convention on the Conservation of Marine Living Resources, and of the Agreed Measures III-VIII, and Recommendation XI-I, all of which are discussed extensively in the text.

<sup>10</sup> For example, Recommendations I-VIII (Conservation of Antarctic Fauna and Flora), III-VIII (Agreed Measures for the Conservation of Antarctic Fauna and Flora); IV-24 (Interim Guidelines for the Voluntary Regulation of Antarctic Pelagic Sealing); Convention for the Conservation of Antarctic Seals, 1 June 1972; Convention on the Conservation of Antarctic Marine Living Resources, 20 May 1980.

the United Nations General Assembly in 1983. Why then the rush to conclude a mineral resources treaty in the face of opposition by Third World States?

As some of the contributors point out, the real motive behind the conclusion of the Antarctic Treaty in the first place was fear of chaos.<sup>11</sup> Without some kind of international control, dozens of States could rush in to do research or exploit resources and ruin the fragile Antarctic environment. Conflicts might break out between States who had territorial claims and those who did not recognize them, and between those States who had overlapping claims.<sup>12</sup> The history of the recent war in the South Atlantic should be evidence enough that such conflicts are more than possible. And the stalemate in finding a legal solution to Chile-Argentina border disputes should be a warning to those who might suggest adjudication as a solution.

Some sort of agreement, such as the Antarctic Treaty, that suspends territorial claims, would seem to be imperative to prevent international discord, and international co-operation is absolutely essential to protect the vulnerable polar ecosystem. Third World critics view the Treaty with suspicion because they see Consultative Party status as a closed club whose membership is available only to wealthy, developed countries. They also object to consultative meetings being held in secret. The Consultative Parties are already beginning to respond to these criticisms. At the September 1983 meetings, just as Antarctica was being inscribed on the United Nations agenda, the Third World States of Brazil and India were admitted to Consultative Party status, and for the first time adherents to the Treaty who are not Consultative Parties were admitted to consultative meetings as observers.

The various essays in *Antarctic Resources Policy* make some other suggestions for 'opening up' the Treaty system to make it more universally acceptable. It will be interesting to see whether any of these suggestions are adopted. In any event, the development of the 'question' through the next few months and years will be an exciting study for all of those fascinated by the knotty problems of polar politics and international law.

LOUISE DE LA FAYETTE

*Manual of the Terminology of Public International Law (Law of Peace) and of International Organisations* By ISAAC PAENSON. Brussels: Bruylant, 1983. xlviii + 846 pp. (including indexes). BFr. 600; \$110.

This remarkable enterprise has the unusual merit of combining originality and utility. It presents a concordance of keywords and phrases in English, French, Spanish and Russian. The author, Dr Paenson, has taken a cross-section of the literature on each topic and the keywords are intended to reflect the different trends in the literature, both 'Western' and 'Marxist'. Thus the basis of the work is the realistic assumption that the terms in use, and not just the terms found within the framework of a particular received view, should be presented in translation.

The material is based upon the literature, that is, the doctrine, rather than the diplomatic or judicial materials of the law, but there is no reason to believe that this alone has substantially affected the catholicity of the terms which are included. The headings are detailed and well organized and this overcomes the occasional eccentricity of the classification. Thus nationality is placed under 'State jurisdiction', and diplomatic protection is placed, rather obscurely, near the end of the same section. 'Admissibility of claims' should have been a major heading of the classification. The most neglected categories are those of particular interest to the practitioner, and especially the problems of 'State contracts'. State responsibility is given rather brief treatment and 'expropriation' does not appear as a keyword (although 'nationalization' does). The machinery of ICSID is not referred to.

<sup>11</sup> See chapter 6 by J. A. Heap, p. 105.

<sup>12</sup> See chapter 20 by Roberto E. Guyer, p. 273.

The work as a whole is of great value and its *modus operandi* as such is sound. No doubt the pattern of inclusion of materials could be improved in the next edition.

IAN BROWNLIE

*Deepsea Mining and the Law of the Sea.* By A. M. POST. The Hague: Martinus Nijhoff, 1983. xxiii + 389 pp. f160; US \$69.50.

Deep sea-bed mining has been one of the most controversial topics of the law of the sea during the last two decades. Dr Post's comprehensive study, published as the eighth volume in *Publications in Ocean Development*, a series edited by Professor Oda, will, not surprisingly, meet with a somewhat controversial reception.

The author deals with deep sea-bed mining by an interdisciplinary approach in which the legal aspects do not dominate. Her description of the technological and economical 'parameters' reveals a detailed knowledge of the background and future prospects of commercial manganese nodule recovery. Her judgement that deep sea mining should be regarded as an industry for the future rather than the present is supported by figures, tables, illustrations and photographs. She also points out that large-scale projects like deep sea-bed mining are not simply undertaken to recover investment, but to serve policy objectives. Perhaps the foremost of these arises from the fact that the supply of the Western industrialized countries is dependent on regions which are generally regarded as being unstable. 'Moreover, through international economic order building, developing countries are attempting to augment their control over international market channels' (p. ix).

Without giving a specific reference she expresses the belief that the late Mr Brezhnev in 1978 saw the Soviet Union as engaged in a 'resource war' aimed at control of the oil and mineral treasure chest of the Middle East and Southern Africa. In the latter region, namely in 'the two client marxist states of Mozambique and Angola, strategically located on either side of Cape Horn [*sic*] close to major sea lanes', the USSR maintains naval bases (pp. 78-80). That kind of political belief seems to influence the results of her legal reasoning.

Dr Post reviews the philosophical concept of the 'common good' in the writings of Thomas Aquinas, Grotius, Locke and Rousseau. But, in the writings of Madison and Hamilton, who developed constitutional institutions to accommodate conflicting interests, instead of common good *per se*, she identifies features which can be compared with Pardo's concept of the common heritage of mankind. However, the essence of the Pardian approach is international administration, which means the control over access rights by an intergovernmental regime: 'In this sense the common heritage concept constitutes a transition from title of ownership to access to use rights, profits, technology and management related to the exploitation of ocean resources' (p. 111). The author offers the paradigms of games theory as a possible way of defining common interests and resolving conflicting interest claims.

On the international plane UNCLOS III has been the stage on which the bargaining process between the different States took place. According to Dr Post the conference format has proved to be inappropriate for comprehensive international law-making. But the collapse of ocean mining treaty-making could benefit ocean miners who would then be able to mine under the original principle of the freedom of the seas, supplemented by interlocking domestic laws for sea-bed mining (p. 165). She suggests a limited treaty dealing only with those issues for which consensus has been reached, or where the issues can be governed by a recourse to customary international law and the extension of existing sources of international law. Thus, national, unilateral legislation and bilateral and reciprocal agreements amongst deep-sea-mining States could become the legal alternative to a universal convention, given that the latter is considered to be too ambitious at the present time.

The analysis of the negotiation process and the ICNT (the appendix includes all major changes which occurred at the eleventh session and constitutes the United Nations Convention on the Law of the Sea) reflects all the major concerns shared by many Western writers and governments. In the envisaged universal treaty regime, the parallel system is little more than a truncated unitary system, which deprives Western corporations of access rights. With its voting majority the group of seventy-seven imposed on the Western deep sea-bed mining nations an agency of potentially formidable and uncontrolled powers (p. 174): for instance, 'the Authority and the Enterprise are granted Immunity in the territory of State parties'. With respect, Dr Post overshoots the mark. Articles 157 (2) and 177 granted the ISA only powers and immunities 'to enable the Authority to exercise its functions', thus restating the 'implied powers and functions' theory, recognized by the International Court of Justice in its advisory opinion in the *Reparation* case. The Enterprise is only protected against discriminatory restrictions and regulations (Annex IV, Article 13).

Unfortunately the book is occasionally marred by careless editing. Thus, EEC and EEZ are confused (p. 102), while Woodrow Wilson is described as the United States President during the Second World War (p. 81) and the English Channel (the book was obviously translated from German) appears as 'Armel Canal' (p. 99).

KARL STEINACKER

*Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights.* By A. H. ROBERTSON. 2nd edition. Manchester: Manchester University Press, 1982. viii + 243 pp. (including index). £17.50.

The first edition of this work was published in 1972 (and reviewed in this *Year Book*, 46 (1972-3), p. 530). The new text is much expanded and space has been found by omitting the documentary appendices. The treatment is comprehensive and judicious, and the book is probably the only general introduction to the subject, written mainly for lawyers, in existence. Accounts of the Helsinki Final Act, and recent developments concerning what used to be called the law of war, are included. There is a carefully composed apparatus of further references. There can be no doubt that the book provides a very useful introduction to a large subject. Given the many institutions and procedures which are chronicled, there is inevitably not much room for critical analysis.

IAN BROWNLIE

*Le Droit des conflits armés.* By CHARLES ROUSSEAU. Paris: Editions A. Pedone, 1983. 629 pp. (including index and tables).

This important volume by the doyen of French international lawyers, a recent President of the Institute of International Law, completes his five existing volumes on public international law. In the *avant-propos* the author observes that the law of armed conflicts has been somewhat neglected for fifty years in France! Indeed, the present work is needed in the rest of the world too; more particularly since the production of the new (1977) Protocols to the Geneva Red Cross Conventions.

There is a discussion of the philosophy and sources of the law of war in the first twenty-six pages (in which a reference to Midgley's important work<sup>1</sup> might well be added in future editions). The theme of the law of war on land, at sea and in the air is then developed, and this is followed by a last hundred pages or so on recourse to force in a system of collective security.

<sup>1</sup> Reviewed in this *Year Book*, 49 (1978), pp. 242-6.

Insurgency, the theme of the second Protocol of 1977 to the Red Cross Conventions, with its implications for resistance movements, is adumbrated and the author, unlike many English writers, refers to guerrilleros (e.g. p. 78), the correct expression for those waging guerrilla warfare: as he says, these conceptions have given rise to unforeseen results, 'un développement imprévisible'. He certainly has a point when he says (p. 80) that one may question whether the law can take under its wing entities which possess a minimum of organization and cohesion.

The failure of sanctions under the League of Nations (of which the USA was never a member) resulted in some return to the concept of impartial neutrality (pp. 383 ff.), though the Kellogg-Briand Pact (as interpreted at Nuremberg) did seem to allow a *liberty*, if not to impose a *duty* on States, to discriminate against an aggressor. Only Spain, Switzerland and Sweden remained conspicuously neutral in the Second World War (p. 387) and many States never joined the fifty-seven belligerents.

The rules of impartial neutrality were followed by Uruguay in the *Graf Spee* incident (pp. 422-6) in 1939. Incidentally, reference to chapter iii of the late Professor O'Connell's *Influence of Law on Sea Power* (1975)<sup>2</sup> might have been useful here: he consulted all the signals of British and German Admiralties.

The *Altmark* incident (p. 416) indicated that even traditional 'impartial' neutrality is not an unconditional right of neutrals who must themselves respect its rules if they are to claim its benefits. Moreover, when a State acts in legitimate self-defence, as in the Falklands case (p. 218), or possibly reacts against terrorism, the case for impartial neutrality is very weak indeed. After the Second World War (p. 390) the French delegations to the United Nations Charter Conference proposed an amendment (not adopted) that there is no place for 'neutrality' in a system of collective security. United Nations sanctions discussed (pp. 593 ff.) have not had the impact hoped for by the draftsmen of the Charter, who optimistically envisaged treaties ceding armed forces to the Security Council under Article 43 of the Charter: agreements to make agreements are not often of practical value, particularly where a dispute is regarded as a domestic one (p. 599), or a veto may be exercised.

The grave problems raised by weapons of mass destruction are necessarily discussed. Rousseau considers the French attitude to nuclear tests (p. 569). When (p. 127) he says: '... Il n'existe aucune disposition juridique qui interdise d'une manière générale la production, la possession et l'emploi des armes nucléaires...' (apart from the Moscow Test Ban Treaty of 5 August 1963), the author, as he informed your reviewer, is speaking of *Treaty Law*. And indeed, the Red Cross Protocol of 1977 does not, so far as the UK and USA are concerned, legislate for nuclear problems. How far the humanitarian principles in the Red Cross Treaties indicate relevant custom or general principles is a different matter: indiscriminate and unnecessary attacks are unlawful.<sup>3</sup>

Rousseau should be acquired by all serious libraries of international law and relations: the 402 divisions of the work contain invaluable bibliographies of Anglo-American, European and other authorities relevant to each division—in the way which made *Oppenheim* so valuable to scholars some thirty years ago. The work is clearly printed and we have only noticed minor *erreurs de frappe* at pp. 140, 171, 246, 261 and 343.

B. A. WORTLEY

<sup>2</sup> Reviewed in this *Year Book*, 48 (1976-7), p. 431.

<sup>3</sup> See this reviewer in this *Year Book*, 54 (1983), at pp. 156-62.

*The New Law of the Sea*. Edited by C. L. ROZAKIS and C. A. STEPHANOU. Selected and Edited Papers of the Athens Colloquium on the Law of the Sea, September 1982. Amsterdam: North Holland Publishing Company, 1983. 354 pp. \$44.75; f105.

This contains a series of papers, of very high standard, by some rather eminent people. The papers of particular interest are those which touch on the really controversial topics. Thus Daniel Vignes gives an excellent, lucid account of the development of the common fisheries policy in the EEC. Jens Evensen has a comprehensive survey of the judicial and arbitral decisions on shelf delimitation, and some trenchant criticisms of the 1982 *Tunisia/Libya* judgment, which will not surprise those familiar with his dissent. Whether his predictions about EEZ boundaries are well founded will become clearer when the *Gulf of Maine* decision is delivered. René-Jean Dupuy discusses the concept of the common heritage of mankind, as applied to the sea-bed, and E. D. Brown follows this with a discussion of the consequences of the failure to agree at UNCLOS III. This is an interesting 'think-piece' about the possible options, and about the advantages and disadvantages of licensing under a 'mini-treaty', outside the Convention regime. What needs to be spelt out, however, is the detail involved in his idea that a 'mini-treaty' might contain provisions to accommodate the concept of the common heritage of mankind.

There are, finally, two useful papers on dispute-settlement. One, by W. Riphagen, surveys the general scheme provided in the 1982 Convention, but in critical and precise manner. The other, by Lucius Caflisch, is more specifically concerned with disputes relating to the international sea-bed area. This is a particularly good analysis of the Convention provisions, for the system is complex as well as original, and Caflisch may be right in his prediction that some of the distinctions may prove to be unworkable.

D. W. BOWETT

*Die Überleitung von Herrschaftsverhältnissen am Beispiel Österreichs*. By IGNAZ SEIDL-HOHENVELDERN. *Austrian Journal of Public and International Law*, Supplement No. 5. Vienna, New York: Springer-Verlag, 1982. ix + 186 pp. \$39.20.

This slim volume portrays Austria's international legal status in the light of decisions of its supreme courts (Supreme Court, Constitutional Court, Administrative Court). The title might freely be translated as: the transition of governmental authority, the example of Austria. Subjects dealt with comprise the identity of States, the continuity of States and of their laws and State succession. The selected cases constitute a kind of legal-historical kaleidoscope tellingly reflecting judicial attitudes—understanding or incomprehension—of the interplay of municipal public law, public international law and the vagaries of politics.

A small selection of cases deals with the Austrian Empire and with the Austro-Hungarian Empire, particularly the relationship between its two constituent halves. The author describes, somewhat exuberantly, as a milestone in the development of international environmental law a decision of the Austrian Administrative Court of 1913 on the question of river pollution along the border with Hungary even though the decision does little more than emphasize reciprocal equitable considerations appropriate in such matters as between neighbouring countries. Still, publication of the decision in English translation<sup>1</sup> is regarded as a reflection of its general importance.

The end of the Austro-Hungarian Empire in 1918 constituted one of several political events which occasioned legal problems regarding the transition, continuity or discontinuity of laws and legal relationships. Generally speaking, the guiding principle followed

<sup>1</sup> *American Journal of International Law*, 7 (1913) pp. 653 ff.

by the courts was that the Republic of Austria did not regard itself as the legal successor to the Monarchy in 1918 nor to the German Reich in 1945.

The central question after the Second World War was whether as a result of Austria's Anschluss it had ceased (theory of annexation) or continued to be (theory of military occupation) a subject of international law. After some wavering, the Austrian Government as well as the highest courts adopted the occupation theory. The courts were consequently able to hold, *inter alia*, that Austria, as a State, had not participated in the Second World War, that Austrian nationality as well as treaties continued in existence after the Anschluss, and that Austria had lawfully declined responsibility for debts of the German Reich.

In his concluding remarks Seidl-Hohenveldern uses instances from contemporary international law as a yardstick for Austrian practice and pertinently observes that the political events concerned constituted special cases. Thus Austrian practice after 1945, attached as it was to the notion of the continuity or at any rate revival of international treaties, was not based on the assumption underlying Article 31 of the 1978 United Nations Convention on Succession of States in respect of treaties, that treaties remain in principle in force for successor States. Austria's occupation by Allied forces (1945-55) was also a special case. Unlike the Allied Zones in West Germany, the Austrian occupational regime was not based on an agreement with the government of the occupied territory. The Hague Rules on Land Warfare were not, therefore, applicable as such.

From all this the author concludes that the examined decisions cannot be considered 'practice' in the sense of being generative of customary international law. This said, it is still an interesting book. The approach is original: cases present and speak for or against themselves. Explanatory comments by the author and literary references are merely supportive of this self-portrait. The author finally expresses gratitude for the courage shown by courts called upon to adjudicate under adverse political circumstances. This may well have been true in many cases. However, there are others, occasionally alluded to, which create a less flattering image.

FRIEDL WEISS

*Canadian Bibliography of International Law.* By CHRISTIAN L. WIKTOR. Toronto: University of Toronto Press, 1984. xxiii + 767 pp. \$95; £80.

It is only since the *Canadian Yearbook of International Law* began publication in 1963 that Canadian international lawyers have had a medium of their own in which to publish their views and comments on international law. Moreover, it is only since that date that their colleagues outside Canada have been made aware of the fact that there are specific problems that worry Canadian international lawyers and that they have views on a variety of issues which are of general interest. It may come as a surprise, therefore, to find that in compiling his *Canadian Bibliography of International Law* Professor Wiktor of Dalhousie University has been able to prepare a compilation of no fewer than 9,040 citations of materials written by Canadians—defined as Canadian nationals or residents, including former residents for the period of their Canadian stay, while for residents there is no *dies a quo*. In addition, some non-Canadian material is included because it was felt that the material in question was of specific interest to Canada or Canadians, such as Edward Iwi's paper in *Transactions of the Grotius Society*, 37 (1951), on 'The Evolution of the Commonwealth since the Statute of Westminster' (p. 82).

The *Bibliography* demonstrates the 'explosion' that has taken place in recent years in the field of Canadian international law as defined by Professor Wiktor's terms of reference. The earliest reference dates from 1755 and refers to the two volumes of the Memorials of the English and French Commissaries concerning the limits of Nova Scotia or Arcadia (p. 169). Nothing further of specific Canadian interest appeared for approximately seventy-five years, until the publication in 1828 in Washington of a 'Message from the

<sup>12</sup> See chapter 20 by Roberto E. Guyer, p. 273.

President Transmitting a Report from the Secretary of State, and the Correspondence with the Government of Great Britain, Relative to the Free Navigation of the River S. Lawrence' (p. 223), and during the entire colonial period ending with the passage of the British North America Act in 1867 there were only twenty-two titles dealing with Canada. From then until the end of the century a further 111 were produced, representing 3.3 titles a year. This average went up to 16.3 by the end of the First World War with a total of 326 items. Since then there has been a steady growth. Thus, for the period 1970 to 1979 there are 3,401 titles, and for the two years 1980-1 no less than 731 (p. xx). Moreover, while 'the 134 publications printed before 1900 primarily dealt with topics concerned with relations with the United States in such matters as boundaries (39 entries), fishery rights and arbitration (29 entries), and bilateral relations between the two countries (13 entries) [t]oday publications fall into all 269 subdivisions of the 32 main subjects' listed (p. xxi). It must be pointed out, however, that the editor has used a very loose conception of international law for the purpose of his compilation, with the result that he has included a number of political and diplomatic biographies and memoirs, as well as a number of articles which can only be considered of potential international political, rather than legal, interest—for example, Laski's 'Sovereignty and Federalism' in the *Canadian Law Times* for 1915, Stevenson's 'Canadian Regionalism in Continental Perspective' in *Journal of Canadian Studies*, vol. 15, or Boyd's *The Future of Canada: Canadianism or Imperialism* (1919). In addition, the author has included references to a number of MA theses, together with a note of the university concerned. What is perhaps more difficult to appreciate is why he has felt it necessary to mention separately as an individual item each edition of any particular work giving the publication details of each of them: see, for instance, the references to the reviewer's *International Law Through The Cases* (pp. 30-1)—perhaps the mention of the various reviews of each edition has been included to indicate whether later editions have been considered any better than the earlier ones. Here one might mention that when citing the reviews of Canadian works, Professor Wiktor has included citations to reviews by both Canadian and non-Canadian writers. By providing this material, the author enables readers, particularly graduate students, to ascertain what other writers think of a particular Canadian work and then to decide whether they wish to seek it out for personal perusal.

In so far as the system of the compilation is concerned, Professor Wiktor has listed his entries under thirty-two specific headings, most of which contain a number of subdivisions. This means, of course, that a researcher will be able with little difficulty to trace the Canadian material relating to his own special interest, while anyone working on the Canadian approach to a particular problem will have much of his basic searching done for him. It might have been more helpful if the entries under a particular writer's name had been in chronological rather than alphabetical order.

The main value of this *Canadian Bibliography of International Law* will be its indication of the contribution of Canadian scholars to their discipline, as well as a detailing of the material that is available concerning Canadian approaches to specific international legal problems, while at the same time providing a useful addition to the growing number of international law bibliographies.

L. C. GREEN

# DECISIONS OF BRITISH COURTS DURING 1984 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW\*

*International civil aviation—application of United States anti-trust legislation—effect of 1977 Bermuda Agreement—relevance to injunction preventing continuance of foreign proceedings*

Case No. 1. *British Airways Board v. Laker Airways Ltd.*, [1984] 3 WLR 413, [1984] 3 All ER 39, HL, reversing [1983] 3 All ER 375, [1984] QB 142, CA, reversing Parker J. This was the British aspect of extensive litigation arising from the conflict, which occurred in the mid-1970s and 1982, between Laker Airways and other established airlines over tariffs and traffic shares on routes between the United States and Europe (including Britain). The litigation was commenced by Laker in a United States District Court in 1982. Laker, a Jersey company in liquidation, claimed that its insolvency had been caused substantially by predatory pricing and other hostile actions on the part of the defendants, two British, two United States and two European airlines. Also involved were McDonnell Douglas Corporation and its airline finance company, who, Laker claimed, had been pressured into withdrawing from a financial rescue plan Laker had been negotiating with them. Laker claimed treble damages under the Sherman and Clayton Acts, amounting to \$1,050 million. In response the two British airlines sought, among other relief, injunctions to restrain the United States action against them. There followed a remarkable series of decisions in the two countries, characterized by acute differences of opinion and almost equally acute misunderstandings.<sup>1</sup> So far as the English proceedings were concerned, the injunctions were denied by Parker J, granted by the Court of Appeal, and finally discharged by the House of Lords. Although the underlying dispute involved a number of difficult questions of public international law, in the end these were not central to the English litigation. By the time the case reached the House of Lords it involved principally the basis on which English courts would restrain litigants from pursuing proceedings elsewhere on *forum non conveniens* grounds. These issues are discussed elsewhere in this volume.<sup>2</sup> However, interesting comments were made at various stages on the public international law issues; in particular on the jurisdictional aspects of the United States action, on the application of anti-trust law to activities carried out under the UK-USA Air Services Agreement of 23 July 1977 (the 'Bermuda II' Agreement),<sup>3</sup> and on the relevance of that Agreement to the claim for injunctive relief.

\* © Professor James Crawford, 1985.

<sup>1</sup> For the US proceedings, *Laker Airways Ltd. v. Pan American World Airways*, see 559 F Supp. 1124 (1983), 568 F Supp. 811 (1983), 731 F 2d. 909 (1984); and *International Legal Materials*, 23 (1984), p. 517.

<sup>2</sup> See below, p. 358.

<sup>3</sup> *United Kingdom Treaty Series*, no. 76 (1977).

1. *Jurisdictional aspects of the United States proceedings*

British courts have previously demonstrated their agreement with the United Kingdom Government's view that United States anti-trust law in its application to extraterritorial activities of foreign nationals is exorbitant and excessive under international law.<sup>4</sup> Had the assertion of civil jurisdiction over the defendants<sup>5</sup> been similarly unjustified, it is clear that the court would have been prepared to grant the relief sought. As Parker J said:

Suppose, for example, that two United Kingdom companies, neither of which traded in or to America, openly made a price agreement lawful in this country but that the purchasers of their goods in this country exported them to the United States. Suppose further that some time later both United Kingdom companies appointed agents in the United States and thus enabled United States proceedings to be served on them and that a United Kingdom company, with a place of business in the United States who had purchased the goods, launched an anti-trust action. In such circumstances it appears to me that justice might well demand that the plaintiff be prevented from pursuing an action in respect of acts performed wholly in this country and wholly lawful here even though, if so prevented, the plaintiff would be left without a remedy. To allow such an action to proceed at the suit of a United Kingdom company would involve exposing United Kingdom defendants to an action based on what is regarded here as an exorbitant assertion of extra-territoriality. . . . [I]f in the present case, it were established that in pursuing its claim in the United States against the present plaintiffs, Laker were a party to any invasion of sovereignty it would follow that an injunction should be granted, or at least that the position constituted a powerful factor in favour of the grant of an injunction.<sup>6</sup>

But the difficulty for the plaintiffs here was that it could not be said that the case was outside the proper scope of United States jurisdiction.<sup>7</sup> Nor did Parker J's examination of the Protection of Trading Interests Act 1980 establish a legislative judgment adverse to the *exercise* of United States jurisdiction. Parker J pointed out that section 6, the 'claw-back' provision of that Act, was an expression of Parliament's

objection to the triple element of the damages in a positive way, as opposed to the negative refusal to enforce judgments, even where the defendant was carrying on business in the foreign country and even where the proceedings concerned activities which were carried on for the most part in that country. This goes further than the *Westinghouse* case and further than would, as it seems to me, be justified by a principle of comity or international law . . . I conclude, therefore, that while s. 5 is based in essence on the principle that the courts here will not enforce the penal laws of another country and s. 6 extends that principle so as to enable the penal element of any amount paid to be recovered in certain circumstances, they cannot be regarded as a sound foundation for any submission that an anti-trust action based in part, or even substantially, on acts committed outside the United States by English companies carrying on business in the United States in relation to the carrying on of that business constitutes such an invasion of sovereignty that a United Kingdom company engaged in a like business should be restrained from pursuing his claim.<sup>8</sup>

<sup>4</sup> *In re Westinghouse Electric Corporation Uranium Contract Litigation*, [1978] AC 547; this *Year Book*, 49 (1978), pp. 282-5.

<sup>5</sup> Or, perhaps, the inseparability of the civil proceedings from a parallel grand jury investigation of the issues.

<sup>6</sup> [1983] 3 All ER 375 at pp. 388, 389.

<sup>7</sup> At p. 381 *per* Parker J; at p. 397 *per* Sir John Donaldson MR.

<sup>8</sup> At p. 391 *per* Parker J, with whose analysis on this point Lord Diplock agreed: [1984] 3 WLR 413 at p. 425.

Excess of jurisdiction was not, therefore, a ground for granting this injunction in this case.<sup>9</sup>

## 2. *The relevance of the Bermuda II Agreement*

However, it was argued that, since Laker's operations took place, and the various tariffs (both Laker's own and the 'predatory' fares) were approved, under the Bermuda II Agreement, that Agreement was relevant and provided a reason for granting relief. The Agreement has not been implemented in United Kingdom law (though it has at least some legal status as an executive agreement under United States law): accordingly, reliance on it had to be indirect. In fact it took two distinct forms. At first instance it was argued that the Agreement was an expression of the public policy of the forum, which was material to the granting of the injunction: the official British view, that to apply the anti-trust laws to activities under the Agreement was a violation of it, was also pressed. Parker J accepted the first, but not the second, argument. He concluded that, in exercising the *forum non conveniens* discretion,

... it is legitimate in some cases to take into account specific matters of policy be it judicially recognised public policy as revealed by the cases or parliamentary as revealed by legislation, or governmental as revealed by treaty or convention to which the government is a party.<sup>10</sup>

However, he clearly thought that there was no inconsistency between the Agreement and the application of the anti-trust laws in this case.

I cannot accept that Laker's claim involves an undermining of Bermuda 2 or any derogation of rights. The essence of Laker's case is that there was a tariff agreement not submitted for approval under Bermuda 2, which provides for the submission of tariff agreements. Furthermore, it is conceded by the plaintiffs that if any combination went as far as to constitute a common law conspiracy, Laker could sue without undermining or derogating from the rights granted under Bermuda 2. For the Attorney-General, counsel made no such express concession but said that each case would depend on its own circumstances. If this be so, it is clear that there is no settled policy or clear international right or obligation preventing the pursuit of a conspiracy claim. An anti-trust claim need not establish anything like as much as required in the case of a common law conspiracy, although Laker's allegations in the American action amount very nearly, if not quite, to the assertion of a common law conspiracy. An anti-trust claim . . . is of a different and special kind. Nevertheless, if there is no obstacle to a conspiracy claim and if, by obtaining authority to discuss and laying before the CAB any agreement reached, anti-trust exemption can be obtained, I see no reason for saying that the application of anti-trust laws undermines Bermuda 2. What, if anything, would undermine it, is a secret agreement not disclosed to the CAB followed by the filing of a tariff presented as an individual tariff when it was in fact filed pursuant to the secret agreement and possibly accompanied by the advancing of false or misleading information as to costs.<sup>11</sup>

<sup>9</sup> After Parker J's decision, but before the Court of Appeal hearing, the Protection of Trading Interests (US Antitrust Measures) Order (SI 1983, No. 900) was made. The Order applies the protection of section 1 of the Act, against the US anti-trust laws, to tariffs charged and other operations pursuant to air services operated by a UK designated airline under the Bermuda II Agreement. The Court of Appeal's decision to grant the injunction was based squarely on the new situation created by the Order (see at pp. 409-10 *per* Sir John Donaldson MR), but that view was not supported either by counsel for the respondents, or the House of Lords, on appeal: see [1984] 3 WLR 413 at pp. 433-4 *per* Lord Diplock.

<sup>10</sup> [1983] 3 All ER 375 at p. 388.

<sup>11</sup> At p. 393, and cf. at pp. 394-5.

The Court of Appeal also thought the Agreement relevant, though for different reasons, and in a different way. Sir John Donaldson MR commented that:

... as a matter of English law, a treaty is an agreement between sovereign states which does not itself give rise to either rights or obligations in private individuals. Consistently with this approach this court has no jurisdiction to determine the meaning or effect of any treaty to which the government of the United Kingdom is a party and indeed is not equipped to do so, that being a matter of public international law. This court is, however, concerned to be informed of the views of Her Majesty's government concerning any treaty which forms part of the background of a dispute between private persons. In the present appeals we have been so informed in the usual way, namely by a statement in open court by or on behalf of Her Majesty's Attorney General. Counsel for the Attorney General has stated that Her Majesty's government regard the government of the United States as being in breach of its obligations under Bermuda 2 in applying or permitting the application of United States anti-trust laws to international commerce and, in particular, to operations carried out under or pursuant to Bermuda 2.

It is a matter of considerable constitutional importance that the courts should be wholly independent of the executive, and they are . . . In matters of home policy, the courts have regard only to the will of Parliament as expressed in the statutes, in subordinate legislation and in executive acts authorised by Parliament.

The position is different in relation to foreign affairs. Relations between the United Kingdom and foreign states are not the subject of direct parliamentary action, but are a matter for Her Majesty acting on the advice of her government. The foreign policy which is adopted is referred to as that of the United Kingdom government, but this is misleading since in reality it is that of the nation. Accordingly, it would be strange if in this field the courts and the executive spoke with different voices and they should not do so . . . [C]ontrary to the views of Parker J, we think that the plaintiffs are entitled to rely indirectly on Bermuda 2, in the sense that account must be taken of the United Kingdom's view of the effect of Bermuda 2 on the United States. The acceptance of that view by the United States would render Laker's claim unsustainable. This is a public policy consideration. Both Laker and the plaintiffs were designated as United Kingdom carriers under that treaty. The United Kingdom government is of the opinion that the United States government is in breach of its obligations under the treaty in permitting the bringing of a claim such as that which Laker is advancing in the district court and is threatening to invade its sovereign rights by instituting grand jury proceedings and seeking to use material obtained in the civil proceedings for that purpose. Laker Airways is a United Kingdom corporation which is entitled to look, and would in appropriate circumstances look, to the protection of the United Kingdom and its government if it was being unfairly treated abroad. This benefit seems to us to carry with it some degree of obligation and to cast some doubt on the legitimacy of the juridical advantage which it seeks to preserve in the United States.<sup>12</sup>

This expressed a very different view of the court's role from that of Parker J: what was relevant was not the proper interpretation of the Agreement, but the United Kingdom Government's view. No independent reason was given by Sir John Donaldson for rejecting Parker J's interpretation of the Agreement—though that question of interpretation is no doubt a difficult one.<sup>13</sup> But if judges are to weigh the public policy of the forum in individual cases, they must retain a degree of

<sup>12</sup> At pp. 402, 403, 409.

<sup>13</sup> For one view see H. A. Wassenbergh, *Air Law*, 9 (1984), p. 170. Although the issue was no doubt in contemplation, the *travaux* of Bermuda II apparently contain no clarification of the point: see [1983] 3 All ER 375 at p. 385 *per* Parker J, at p. 402 *per* Sir John Donaldson MR. Generally see N. M. Matte, *Treatise on Air-Aeronautical Law* (1981), pp. 230–50; M. J. Kenny, 'Extraterritorial Application of Competition Law', in A. Kean (ed.), *Essays in Air Law* (1982), p. 125.

independence in doing so, and in particular they must act on reasons, including, no doubt, deference to the views of the executive on questions within its authority—but not excluding other arguments.

The orthodox, independent view was firmly reinstated by Lord Diplock on appeal. He commented that the statement of the Government's view of the litigation presented to the courts below and to the House was

... a dubious advantage, for the litigation ... both in the United States and in England falls within the field of private law, where the sources of the public policy to which courts of justice give effect in litigation between subject and subject are to be found in judicial decisions and in legislation and not in the views of the executive government except in the relatively narrow field of international relations between sovereign states which is still reserved to the prerogative.<sup>14</sup>

He added that:

the interpretation of treaties to which the United Kingdom is a party but the terms of which have not either expressly or by reference been incorporated in English domestic law by legislation is not a matter that falls within the interpretative jurisdiction of an English court of law. In this House the contrary has not been contended and no arguments have been addressed to your Lordships directed to the construction of the language of Bermuda 2. In the United States, where Bermuda 2 is part of the domestic law, it may be that [the respondents] will be able to rely upon its provisions as providing one or both of them with a defence in the American action; but that is not a matter upon which your Lordships can relevantly indulge in speculation.<sup>15</sup>

The arguments made for the respondents and the Crown on appeal were by no means the same as those addressed to Parker J. The substantive international law arguments having received scant support at first instance—and having been accepted as a matter of deference to the executive without reference to their merits in the Court of Appeal—it is not surprising that counsel for the airlines and the Crown were not anxious to risk their rejection by the House of Lords itself. But Lord Diplock was no more impressed by their indirect implications:

... by obtaining an air transport licence ... to operate scheduled services on routes between the United Kingdom and the United States as British airlines designated by the United Kingdom government under Bermuda 2, [the respondents] and Laker alike voluntarily submitted themselves to a regulatory regime which, so far as their operations within the territorial jurisdiction of the United States were concerned, required that each of them should become subject to American domestic law including American antitrust laws. In the circumstances as I have outlined them, it seems to me to be impossible to argue plausibly either that Laker by submitting itself to such a regime precluded itself from relying upon any cause of action against [the respondents] that might accrue to it under American antitrust laws as a result of what these airlines subsequently did within the territorial jurisdiction of the United States ...

[T]he Court of Appeal appear to have considered that the fact that Laker, as a British airline designated under Bermuda 2, would be entitled to look to the United Kingdom Government for protection if it considered itself to be treated in the United States in an unfair way inconsistent with that treaty 'cast some doubt on the legitimacy of the juridical advantage which [Laker] seek to preserve in the United States'. For my part, I fail to

<sup>14</sup> [1984] 3 WLR 413 at p. 425.

<sup>15</sup> At p. 426.

follow this reasoning unless it amounts to a variant of the 'admission to membership of scheduled airlines' club' argument which I have rejected . . .<sup>16</sup>

It is hard to discern in these comments much sympathy for the substantive argument from the Bermuda Agreement. In this as in other respects, the indirect, even subcutaneous, implications of the case are much more interesting than what turned out to be its relatively elementary 'substance'.

*Arbitration Act 1975—New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958—retrospectivity*

*Case No. 2. Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners*, [1984] AC 426, [1984] 1 All ER 733, [1984] 2 WLR 340, [1984] 1 Lloyd's Rep. 458, HL, affirming [1983] 2 All ER 734, [1983] 1 WLR 818, [1983] 1 Lloyd's Rep. 396, CA, reversing [1981] 1 Lloyd's Rep. 656, Mocatta J. The decision of Mocatta J at first instance in this case was noted in an earlier volume of this *Year Book*.<sup>17</sup> Mocatta J had decided two questions of interpretation of the Arbitration Act 1975 implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.<sup>18</sup> One was whether the words 'conclusive evidence' in section 7 (2) of the Act, which provides for Orders in Council declaring a State to be a party to the Convention, prevented *other* evidence of a State's participation (the Order in Council in the case of Kuwait having been made some time after Kuwait's accession to the Convention, and after the present proceedings had been commenced). Mocatta J held that other evidence of participation could be adduced: the term 'conclusive' did not mean 'exclusive'. There was no appeal on this point.<sup>19</sup> The other, and more difficult, question was whether the Act applied to awards made in a 'Convention State' at any time, or only to awards made after the State in question became a party to the Convention. Mocatta J had preferred the latter, more restricted, interpretation, but as was pointed out in the earlier note, this view is probably inconsistent with the Convention itself, to which Mocatta J did not refer in any detail.<sup>20</sup> In the event the Court of Appeal and the House of Lords unanimously preferred the broader interpretation of the Act and the Convention contended for by the respondents in the House of Lords. Kerr LJ in particular referred to a range of international and comparative law material:

The question of 'retroactivity' is complicated by the fact that in a number of states the legislation giving effect to the Convention provided expressly that it was only to apply to awards made thereafter. But, where this has not been the case, the predominant view appears to be that the Convention has what would—I think inaccurately—be described as having 'retrospective' effect. However, in my view the material is too disparate to provide any reliable guidance for present purposes under the principle of comity, other than to show that there is nothing internationally dissonant in the construction of the 1975 Act which I consider to be correct, for the reasons already stated, and that this construction in fact appears to be in line with the law in other New York Convention States.<sup>21</sup>

<sup>16</sup> At pp. 424, 433. And see the succinct summary by Lord Scarman at p. 435. The other members of the House agreed.

<sup>17</sup> This *Year Book*, 52 (1981), pp. 301-4.

<sup>18</sup> *United Nations Treaty Series*, vol. 330, p. 3.

<sup>19</sup> See [1983] 1 Lloyd's Rep. 596 at p. 601 *per* Kerr LJ.

<sup>20</sup> This *Year Book*, 52 (1981), at pp. 303-4.

<sup>21</sup> [1983] 1 Lloyd's Rep. 596 at p. 604.

In apparent contrast Lord Brandon (with whom the other members of the House of Lords agreed) emphasized the ordinary or literal interpretation of the words of the Act to the exclusion of other lines of argument. However, he added that:

It has long been established that, if a provision in a domestic Act giving effect to the adherence by the United Kingdom to an international convention is ambiguous, a United Kingdom court is entitled to refer to the text of the Convention concerned in order to obtain assistance, if it can, in resolving the ambiguity. In the present case I do not consider, as I hope that I have made it clear, that the definition of the expression 'Convention award' contained in section 7 (1) of the Act of 1975 is ambiguous. If that is wrong, however, and the definition is ambiguous, it is permissible to refer to the text of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) in order to obtain assistance in resolving the ambiguity. Such assistance is, in my view, to be found in Article VII, paragraph 2, of that Convention, which provides:

'2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 shall cease to have effect between contracting states on their becoming bound and to the extent that they become bound, by this Convention.'

... The effect of Article VII, paragraph 2, of the New York Convention is that, upon two or more states which were parties to the Geneva Treaties of 1923 and 1927 becoming parties to the New York Convention, and thereby becoming bound by its provisions, the two earlier treaties shall no longer apply as between such states. If the expression 'Convention award' in the Act of 1975 is construed in the way contended for by the appellants, the result of Article VII, paragraph 2, would be to produce a grave lacuna in the reciprocal recognition and enforcement of arbitral awards as between many states. . . . The existence of this lacuna, as between the United Kingdom and other states who were previously parties to the Geneva Treaty of 1927 and have since become parties to the New York Convention, cannot have been intended by the legislature when it passed the Act of 1975. These considerations strongly reinforce the view that the construction of the expression 'Convention award' in the Act of 1975 contended for by the appellants is wrong, and the construction contended for by the respondent is right.<sup>22</sup>

The 'lacuna' to which Lord Brandon referred was that, if the 1958 Convention applied only to awards made after the State became a party to that Convention, and if the previous treaties of 1923 and 1927 ceased to have effect in relation to that State, this meant that earlier awards would be totally unenforceable. Although this 'lacuna' might perhaps be avoided by way of the phrase 'to the extent that they become bound' in Article VII (2) of the Convention, the argument none the less has considerable force. It is regrettable therefore that, on a literal interpretation of Lord Brandon's comments at the beginning of this passage of his speech, the argument was an 'impermissible' one. Tendentious assertions about 'ambiguity' should not, these days, deprive courts of access to relevant (here, strongly reinforcing) arguments about the meaning of treaty-implementing statutes.<sup>23</sup>

<sup>22</sup> [1983] AC 426 at pp. 435-6. For earlier argument to this effect, see Gaja, *International Commercial Arbitration; New York Convention* (1980- ), vol. 1, p. III.B.7.

<sup>23</sup> Other decisions during the period under review involving the interpretation of treaty-implementing statutes included *RH & D International Ltd. v. IAS Animal Air Services Ltd*, [1984] 2 All ER 203 (Neill J) (Carriage of Goods by Road Act 1965; CMR Convention, Articles 32 (4), 36; consignee unable to counterclaim against carrier by way of set-off in an action by carrier for freight); *The Benarty*, [1984] 3 WLR 1082 (CA) (Carriage of Goods by Sea Act 1971; Hague-Visby Rules

*Judicial review—unimplemented treaty—European Convention on Human Rights, Article 3—extradition to non-member State—whether duty to consider*

Case No. 3. *R v. Secretary of State for the Home Department, ex parte Kirkwood*, [1984] 1 WLR 913, [1984] 2 All ER 390, Mann J. The United States Government sought the extradition from the United Kingdom of Kirkwood, a United States national, on charges of murder and attempted murder allegedly committed in California in 1982. He applied to the European Commission of Human Rights on the basis that his extradition would contravene Article 3 of the European Convention, since the inordinate delay in carrying out the death penalty in California amounted to inhuman or degrading treatment or punishment.<sup>24</sup> Under rule 36 of the Commission's rules of procedure, Kirkwood's non-extradition was for a time indicated as an 'interim measure'. The Home Secretary complied with these indications, but when in December 1983 they were not renewed, he took steps by warrant under section 11 of the Extradition Act 1870 to extradite Kirkwood. On an application for judicial review and for a stay of the decision, it was argued that the Home Secretary had unreasonably failed to consider the United Kingdom's obligations to Kirkwood under Article 3, in particular since the European Commission was shortly to hear his application.

Mann J held that he had no power to grant a stay, since that would have the same effect as an injunction against the Crown, precluded by section 21 of the Crown Proceedings Act 1947. Not surprisingly dissatisfied with this arid and unfruitful conclusion, Mann J did, however, consider the merits of the claim. Citing an unreported Court of Appeal decision,<sup>25</sup> he held that the Home Secretary was under no obligation to consider the Convention.<sup>26</sup> However, he added that:

... the Secretary of State has in fact taken into account the treaty obligations and manifestly so. [Counsel] points to the Secretary of State having stayed his hand whilst the rule 36 indications were extant. Indeed, it is deposed to on his behalf that it is the practice of the United Kingdom to comply with the rule 36 indications. That is a practice. It cannot be more, because the indication is a mere indication and gives rise to no obligation in the field of public international law. It does not, of course, give rise to any obligation under our municipal law.<sup>27</sup>

In the event the European Commission, a month later, declared Kirkwood's application under Article 3 inadmissible.<sup>28</sup>

Article IIIs para. 8, VIII; validity of exclusive jurisdiction clause; term 'statute' in Article VIII not restricted to UK statutes); *Mayhew Foods Ltd. v. Overseas Containers Ltd.*, [1984] 1 Lloyd's Rep. 317 (Carriage of Goods by Sea Act 1971; Hague-Visby Rules; scope of application); *Roberts v. Tate & Lyle Food and Distribution Ltd.*, [1983] ICR 521 (EAT) (Sex Discrimination Act 1975; EEC Treaty Article 119; application to retirement benefits).

<sup>24</sup> In 'exceptional circumstances' Article 3 can protect a person from extradition or deportation to another country where he risks inhuman or degrading treatment: see J. E. S. Fawcett, *The Application of the European Convention on Human Rights* (1969), pp. 39-40, 87-9.

<sup>25</sup> *R v. Home Secretary, ex parte Fernandes*, *The Times*, 21 November 1980, p. 23; this *Year Book*, 52 (1981), p. 310 n. 3.

<sup>26</sup> [1984] 1 WLR 913 at p. 919.

<sup>27</sup> *Ibid.*

<sup>28</sup> Other cases in 1984 where the European Convention was referred to included a number of cases involving prisoners' rights in legal proceedings. In *R v. Secretary of State for the Home Department, ex parte Anderson*, [1984] 1 All ER 920, a Divisional Court held *ultra vires* a standing order under section 47 (1) of the Prison Act 1952 which prevented a prisoner from seeing his legal adviser to discuss proceedings for mistreatment, without at the same time lodging an internal complaint (the

'simultaneous ventilation' rule). As Robert Goff LJ pointed out (at pp. 925-6), the simultaneous ventilation rule had been suggested by the European Commission itself in *Silver v. United Kingdom* (1980), 3 EHRR 475 at pp. 502-3, as a possible alternative to the 'prior ventilation' rule which the Commission held was inconsistent with Article 6 of the European Convention. None the less the Court, relying both on the *Golder* case and on *Raymond v. Honey*, [1982] 1 All ER 756, held that the new rule did still unduly restrain or fetter a prisoner's access to the courts: see [1984] 1 All ER 920 at pp. 928-9. In *R v. Secretary of State for the Home Department, ex parte Tarrant*, [1984] 1 All ER 799, another Divisional Court upheld claims by Anderson and others that a prison board of visitors hearing disciplinary charges against them had improperly failed to consider whether they should have legal representation or assistance. Webster J found it unnecessary to deal with arguments based on Article 6 of the European Convention since the same result followed from the English case law: at p. 814. Kerr LJ referred to the European Commission's report in the *Campbell and Fell* case (1982), 5 EHRR 207, which had been cited as authority for a right to legal representation on charges for 'especially grave' offences before a board of visitors, but commented that:

'this court cannot accept any argument based solely on this report, since we are bound by the settled jurisprudence of our law to which I have already referred. Her Majesty's Government has not accepted the conclusions of the majority of the members of the Commission; the case has been argued before the European Court of Human Rights and the judgment is now pending. However, in relation to Tarrant and Leyland, who were . . . charged with mutiny under r. 52, our conclusion on the present applications leads to the same result in practice, though for different reasons, as the application of art. 6 (3) (c) of the convention with the exception of a right to legal aid, which is regulated by statute. . . . The position under the convention may arise for consideration by the Home Secretary and possibly by Parliament when the pending judgment of the court has been given, and it may be that this will also take the outcome of the present applications into account.' (at p. 824)

However, the Court held that no reasonable board of visitors could deny an application for representation on the mutiny charge, thus effectively reaching the same conclusion as the European Commission had done in the *Campbell and Fell* case. For the subsequent decision of the European Court, affirming the view that the denial of a right to legal representation violated Article 6, see ECHR, Series A, vol. 80 (1984). For comment see Jones, *Modern Law Review*, 47 (1984), pp. 587-93, and note, *Public Law*, 1984, p. 341. In the third case, *R v. Home Secretary, ex parte McAvoy*, [1984] 1 WLR 1408, Webster J held that in deciding whether to shift an unconvicted prisoner to another prison under section 12 of the Prison Act 1952, the Home Secretary was under an obligation to consider the prisoner's rights to freedom of correspondence and access to legal advice under rules 34 and 37 of the Prison Rules 1964. He commented:

'In response . . . to submissions that neither of those rights are justiciable except in the sense that I have already described, [counsel] relies on various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms . . . It is not necessary to decide whether the general rights can properly be described as justiciable or not. The Convention is not part of the law of England; but none the less, the two particular rules which I have cited do reflect those rights. Although the rights conferred by those particular rules are subject to express or implied limitations . . . in my view, in exercising his powers, . . . the Secretary of State is obliged to take those rights into account in the first instance as if they exist without being subject to those limitations.' (at p. 1414)

Cf., however, *R v. Governor of Camphill Prison, ex parte King*, [1985] 2 WLR 36, where the Court of Appeal held that decisions of a prison governor on matters of discipline under the Prison Rules were not amenable to judicial review: the European Court's decision in the *Campbell and Fell* case was cited in argument but not by the court.

Another case, *Trawnik v. Ministry of Defence*, [1984] 2 All ER 791, concerned a claim against the Ministry by residents of the British sector of Berlin that its proposal for a shooting range close to their houses would constitute a nuisance. An action in the Berlin courts had failed because the Allied Kommandatura refused the necessary consent to proceed. The action against the Ministry failed because of a conclusive certificate under section 40 (2) (b) of the Crown Proceedings Act 1947 to the effect that any Crown liability arose 'otherwise than in respect of Her Majesty's Government in the United Kingdom'. Sir Robert Megarry V-C referred to the argument made by counsel from Article 6 (1) of the European Convention, and commented that he did not 'need the European Convention on Human Rights to tell me that it is deplorable that . . . there is no court with power to decide whether the plaintiffs are entitled to the remedy that they seek . . . The convention is not, of course, law, though it is legitimate to consider its provisions in interpreting the law; and naturally I give it full weight for this purpose' (at p. 798). In the event he struck out the claim against the Ministry but allowed an application to join the Attorney-General and the British military Commandant of Berlin as defendants.

*Foreign State immunity from execution—embassy bank account—whether used for ‘commercial purposes’—State Immunity Act 1978, sections 3 (1) and (3), 13 (4), 17 (1)—interpretation of statute by reference to general international law*

*Case No. 4. Alcom Ltd. v. Republic of Colombia*, [1984] 2 All ER 6, [1984] AC 580, [1984] 2 WLR 750, HL, reversing [1984] 1 All ER 1, [1983] 3 WLR 906, [1984] 1 Lloyd's Rep. 368, CA. The decision of the Court of Appeal in this case was noted in the last volume of this *Year Book*.<sup>29</sup> The issue was whether a current bank account held by Barclays Bank in the name of the Republic of Colombia and operated by it for the purposes of maintaining its London embassy, was subject to attachment by way of garnishee under the State Immunity Act 1978, section 13 (4), as ‘for the time being in use or intended for use for commercial purposes’. The Court of Appeal held that it was liable to attachment, relying on the extended definition of ‘commercial purposes’ in section 17 (1) of the Act.<sup>30</sup> The judgment sought to be enforced was a default judgment against the Republic for goods sold and delivered. After the Court of Appeal's decision the default judgment was set aside, on the basis that the Republic's non-appearance in the action was due to a misunderstanding of the procedures for service under the 1978 Act.<sup>31</sup> The garnishee order consequently lapsed, and the appeal as to its validity was reduced to an argument about costs. However, the House of Lords heard full argument on the point, in view of what Lord Diplock described as its ‘outstanding legal importance not only nationally but also internationally’.<sup>32</sup> In a single rather elliptical speech delivered by Lord Diplock (with whom the other members of the House merely agreed) the appeal was allowed, with the parties bearing their own costs.

Lord Diplock's speech places its initial emphasis on the state of public international law, both generally and with respect to embassy accounts. He said:

The Act, as its short title indicates, deals primarily with relations between sovereign states, though its provisions are capable of extension by Order in Council to relations between the United Kingdom and the constituent territories of federal states. Accordingly, its provisions fall to be construed against the background of those principles of public international law as are generally recognised by the family of nations. The principle of international law that is most relevant to the subject matter of the Act is the distinction that has come to be drawn between claims arising out of those activities which a state undertakes *jure imperii*, i.e. in the exercise of sovereign authority, and those arising out of activities which it undertakes *jure gestionis*, i.e. transactions of the kind which might appropriately be undertaken by private individuals instead of sovereign states. . . .

[T]he English courts during the twentieth century were slow to recognise and give effect to the change that had been taking place in public international law over the last 50 years, whereby among the great majority of trading nations, the restrictive theory of sovereign immunity had replaced the absolute theory. That recognition first occurred in a judgment of the Privy Council in *The Philippine Admiral*, though this in its terms was limited to actions in rem. It was the seminal judgment of Lord Denning M.R. in *Trendtex Trading Corp v.*

<sup>29</sup> This *Year Book*, 54 (1983), pp. 285–8.

<sup>30</sup> Section 17 (1) provides that “‘commercial purposes’ means purposes of such transactions or activities as are mentioned in section 3 (3)”, that is, the purposes of commercial transactions as defined by section 3.

<sup>31</sup> See [1984] 2 All ER 6 at pp. 13–14 *per* Lord Diplock.

<sup>32</sup> At p. 8. Not surprisingly, the costs incurred in the case greatly exceeded both the amount of the default judgment and the balance in the account!

*Central Bank of Nigeria* that marked the definitive absorption by the common law of the restrictive theory of sovereign immunity.<sup>33</sup>

There is a further point, referred to briefly by Lord Diplock, that has to do specifically with diplomatic missions. International law also required that a State should not obstruct a foreign diplomatic mission from carrying out its proper functions, an obligation reflected in Article 25 of the Vienna Convention on Diplomatic Relations of 1961.<sup>34</sup>

So far as 'embassy accounts' are concerned, Lord Diplock relied heavily on the decision of the West German Federal Constitutional Court in the *Philippine Embassy* case,<sup>35</sup> which had not been cited before the lower courts. He described it as

... a comprehensive and closely reasoned judgment ... which decisively rejected the claim of a judgment creditor of the Philippine Republic to distrain on a current bank account maintained by the diplomatic mission of that sovereign state for the purpose of defraying the expenses incurring in the day-to-day running of the mission. It was thus a case which was closely parallel to that with which this House is now concerned; and the judgment is particularly helpful inasmuch as the question was decided by that distinguished court by reference to public international law which, by the Federal Constitution Act, is incorporated ipso jure as part of German Federal Law. My Lords, I find the reasoning of the German Constitutional Court ... wholly convincing that immunity from legal processes of execution was required by public international law to be accorded to the current bank account of a diplomatic mission used for defraying the expenses of running the mission at the date when the State Immunity Act 1978 was passed by Parliament of the United Kingdom.<sup>36</sup>

This conclusion as to the international law position could not, however, be decisive, since the question was governed by an Act of Parliament. The difficulty the Court of Appeal had had was with the apparently intractable language of sections 3 (3) and 17 (1) of the 1978 Act. Fortified, however, by his conclusion as to the requirements of international law, Lord Diplock was able to avoid the difficulty. He did so not so much by any different or secondary interpretation of sections 3 (3) or 17 (1) (such as the Court of Appeal had been unable to discover) but by reliance on a form of onus of proof. The initial, and crucial, point is that a bank account, admittedly 'property' for the purposes of section 13 (4), is a 'single, not a composite chose in action'.<sup>37</sup> It follows that it must be shown that the whole account is, at the relevant time, 'in use or intended for use for commercial purposes', the onus being on the judgment creditor. Thus, according to Lord Diplock,

... the decisive question is whether in the context of the other provisions of the Act to which I have referred, and against the background of its subject matter, public international law, the words 'property which is for the time being in use or intended for use for commercial purposes' ... are apt to describe the debt represented by the balance standing to the credit of a current account kept with a commercial banker for the purpose of meeting the expenditure incurred in the day-to-day running of the diplomatic mission of a foreign state.

<sup>33</sup> Ibid.

<sup>34</sup> At p. 9. Article 25 is not, however, one of the provisions of the Vienna Convention scheduled to and given the force of law by the Diplomatic Privileges Act 1964. Nor are 'embassy accounts' included in the diplomatic property made inviolable by Articles 22, 24 and 30 of that Convention.

<sup>35</sup> 46 BVerfGE 342 (1977).

<sup>36</sup> [1984] 2 All ER 6 at p. 9.

<sup>37</sup> At p. 11.

Such expenditure will, no doubt, include *some* moneys due under contracts for the supply of goods or services to the mission, to meet which the mission will draw on its current bank account; but the account will also be drawn on to meet many other items of expenditure which fall outside even the extended definition of 'commercial purposes' for which ss. 17 (1) and 3 (3) provide. The debt owed by the bank to the foreign sovereign state and represented by the credit balance in the current account kept by the diplomatic mission of that state as a possible subject matter of the enforcement jurisdiction of the court is, however, one and indivisible; it is not susceptible of anticipatory dissection into the various uses to which moneys drawn on it might have been put in the future if it had not been subjected to attachment by garnishee proceedings. Unless it can be shown by the judgment creditor who is seeking to attach the credit balance by garnishee proceedings that the bank account was earmarked by the foreign state solely (save for *de minimis* exceptions) for being drawn on to settle liabilities incurred in commercial transactions, as for example by issuing documentary credits in payment of the price of goods sold to the state, it cannot, in my view, be sensibly brought within the crucial words of the exception for which s. 13 (4) provides.<sup>38</sup>

In the circumstances the Colombian Ambassador's certificate that the funds 'are not used nor intended for use for commercial purposes but only to meet the expenditure necessarily incurred in the day-to-day running of the Diplomatic Mission' was, Lord Diplock held, 'conclusive' of the appeal.<sup>39</sup>

This is, with respect, not entirely convincing. Clearly enough the Ambassador did not conceive that *any* use of the account for the purposes of maintaining an embassy could be 'commercial', and in some general sense this may well be right. But the context here was the special, indeed stipulative, one of section 17 (1) of the Act, under which it seems clear that many at least of the uses of the account would be 'commercial'. Moreover, Lord Diplock provided no actual examples of transactions through the account which would not be 'for the purposes of commercial transactions' as defined by section 3 (3): in the Court of Appeal counsel for the Republic had been pressed for such examples, without result.<sup>40</sup> But the implications of the decision go beyond the specific and rather special problem of embassy accounts. Under section 13 (4) as now interpreted, it has to be shown that property is in use for commercial purposes (or, presumably, not being in use for any purpose at all, is intended for use for commercial purposes) exclusively or very substantially: in Lord Diplock's words, 'save for *de minimis* exceptions'. A foreign State wishing to immunize its property from enforcement proceedings could therefore either have that property held in an undifferentiated account by its central bank,<sup>41</sup> or ensure that the account in question is used for a variety of purposes including non-commercial purposes in the broad sense.<sup>42</sup> These problems may not be severe when it comes to tangible property (i.e. property other than funds), though again it may well be possible by manipulating the uses to which property is put in effect to confer an immunity upon it. But it can be argued that if State property is to be seized to satisfy judgments against the State, funds represent the most desirable target. Unless the foreign State is insolvent, funds can be readily replaced. They can be used for a variety of purposes, and are not (unless held in specific purpose or 'earmarked' accounts) intrinsically set aside for specific

<sup>38</sup> At pp. 12-13.

<sup>39</sup> *Ibid.*

<sup>40</sup> See [1984] 1 All ER 1 at p. 6 *per* Sir John Donaldson MR.

<sup>41</sup> Under section 14 (4) central bank accounts are altogether immune from attachment.

<sup>42</sup> In practice, it seems that States do not usually hold funds abroad in 'earmarked' accounts.

tasks. The effect of the House of Lords decision may well be to make funds more rather than less difficult to attach, compared with other forms of State property, and correlatively to make the task of immunizing such funds from attachment easier than in the case of other property. No doubt there are good arguments for preventing judgment creditors from attaching 'embassy accounts', though it should be pointed out that the term 'embassy accounts' is not a term of art, and it might be difficult to obtain assurances that such accounts were used wholly or substantially for the purposes of maintaining an embassy, as distinct from conducting a broader range of transactions. But if such protection is to be provided, it seems better to do so by a specific provision.<sup>43</sup>

*Extradition Act 1870—'double criminality'—whether a requirement in principle—relevance of foreign law*

*Case No. 5. Government of Denmark v. Nielsen*, [1984] AC 606, [1984] 2 All ER 81, [1984] 2 WLR 737, 79 Cr. App. R. 1, HL. Although the principle of 'double criminality' is commonly referred to as a basic principle of the law of extradition, indeed even a principle of customary international law,<sup>44</sup> there has long been disagreement about whether this is so,<sup>45</sup> a disagreement which corresponds closely to the underlying uncertainty about the status of any such general principles in this field. There is also uncertainty about the role of the courts of the requested State in applying the law of the requesting State: plainly it is not their function to determine the existence of a prima-facie case of a crime against foreign law on the evidence,<sup>46</sup> but there are certainly examples of courts interpreting or applying foreign law to determine whether, on the facts as alleged, the defendant *could* be guilty of the specified crime.<sup>47</sup> Indeed, according to Lord Diplock in the present case:

So far as living memory stretches it appears to have been the invariable practice of the requisitioning foreign government in all accusation cases to call expert evidence of its own criminal law in order to prove that what the fugitive criminal is accused of having done, within the jurisdiction of its courts, is not only criminal under its domestic law but is also a crime that is 'substantially similar' (or 'similar in concept') to one or more of the English crimes of which descriptions are included in the 1870 list or later lists as currently amended and reproduced in the English language version of the extradition treaty with that state.<sup>48</sup>

This practice supported the general view—however variously expressed—that the principle of double criminality required more than a prima-facie determination of criminality under local law, and that at least the general purport of the

<sup>43</sup> Cf. the recommendation of the Australian Law Reform Commission, Report 21, *Foreign State Immunity* (1984), para. 131, which would specifically exempt property in use predominantly for the purpose of establishing or maintaining a diplomatic or consular mission, or a visiting mission, of a foreign State.

<sup>44</sup> e.g. Shearer, *Extradition in International Law* (1971), pp. 137-41; Brownlie, *Principles of Public International Law* (3rd edn., 1979), p. 315.

<sup>45</sup> See, e.g., the differing views expressed in and about *Factor v. Laubenheimer*, 290 US 276 (1933); esp. M. O. Hudson, *American Journal of International Law*, 28 (1934), p. 274; E. M. Borchard, *ibid.*, p. 742.

<sup>46</sup> Shearer, *op. cit.* above (n. 44), p. 139.

<sup>47</sup> Especially *Schtraks v. Government of Israel*, [1962] 3 All ER 529 at pp. 533, 546-7, 551-2; and cf. *USA v. Link*, [1955] 3 DLR 386 (Quebec S. Ct.). But cf. *R v. Governor of Pentonville Prison, ex parte Elliott* (1975), 119 Sol. J. 709.

<sup>48</sup> [1984] 2 All ER 81 at p. 89.

foreign law relied on is also relevant.<sup>49</sup> But this view has now been sternly and unanimously rejected by the House of Lords, in cases to which the Extradition Act 1870 applies, in the absence of some contrary stipulation in the extradition treaty (and apart from cases of 'political offences'). In the words of Lord Diplock:

Whether in an accusation case the police magistrate has any jurisdiction to make findings as to the substantive criminal law of the foreign state by which the requisition for surrender of a fugitive criminal is made will depend on the terms of the arrangement made in the extradition treaty with that state. Some treaties may contain provisions that limit surrender to persons accused of conduct that constitutes a crime of a particular kind (for example, one that attracts specified minimum penalties) in both England and the foreign state. Accusation cases arising under extradition treaties that contain this kind of limitation I shall call 'exceptional accusation cases'. In an exceptional accusation case it will be necessary for the police magistrate to hear expert evidence of the substantive criminal law of that foreign state and make his own findings of fact about it.

In conviction cases, too, if the foreign certificates or judicial documents stating the fact of conviction issued in accordance with the procedure followed by that state do not recite the facts on which the conviction was based but only give the name of the crime or the article of the criminal code of the foreign state of which the fugitive criminal was convicted, expert evidence of what under the law of that foreign state constitute the kinds of conduct and state of mind of a person that make him guilty of that particular offence will be admissible before the magistrate in order to enable him to decide whether that kind of conduct and state of mind would constitute in English law a crime described in the list in the Extradition Acts 1870 to 1935 as amended. . . .

The jurisdiction of the magistrate is derived exclusively from the statute. It arises when a person who is accused of conduct in a foreign state which if he had committed it in England would be one described in the 1870 list . . . has been apprehended and brought before the magistrate under a warrant issued pursuant to an order made by the Secretary of State under s. 7 or confirmed by him under the last paragraph of s. 8.

At the hearing, ss. 9 and 10 require that the magistrate must first be satisfied that a foreign warrant has been issued for the accused person's arrest and is duly authenticated in a manner for which s. 15 provides. Except where there is a claim that the arrest was for a political offence or the case is an exceptional accusation case, the magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state.

The magistrate must then hear such evidence as may be produced on behalf of the requisitioning foreign government, and by the accused if he wishes to do so; and at the conclusion of the evidence the magistrate must decide whether such evidence would, *according to the law of England*, justify the committal for trial of the accused for an offence that is described in the 1870 list (as added to or amended by subsequent Extradition Acts) provided that such offence is also included in the extraditable crimes listed in the English language version of the extradition treaty. In making this decision it is English law alone that is relevant. The requirement that he shall make it does not give him any jurisdiction to inquire into or receive evidence of the substantive criminal law of the foreign state in which the conduct was in fact committed.<sup>50</sup>

It follows that, in such cases, it is not open to the defendant to argue before the magistrate that the crime alleged against him does not exist under the relevant foreign law, or that he could not under that law be guilty of it. Indeed, taken to its

<sup>49</sup> e.g. *R v. Governor of Pentonville Prison, ex parte Budlong and Kember*, [1980] 1 All ER 701 at p. 712 *per* Griffiths J; see this *Year Book*, 51 (1980), pp. 327-8.

<sup>50</sup> [1984] 2 All ER 81 at pp. 89, 91 (emphasis in original). The other Lords agreed.

full extent, it appears that it would not be open to the magistrate to determine that the offence alleged did not amount to an extradition crime, under the foreign law, provided that the facts alleged did satisfy one of the descriptions of an extradition crime in the 1870 Act and the treaty as a matter of English law. The safeguard in such cases is not, in Lord Diplock's view,<sup>51</sup> any principle of double criminality but the 'principle of speciality' embodied in section 3 (2) of the Act and in extradition treaties generally; this prevents the defendant from being detained or tried 'for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded'.<sup>52</sup> It would also, no doubt, be open to the Home Secretary not to order the return of a fugitive where the relevant foreign offence was not an extraditable offence.<sup>53</sup>

Although the 1870 Act, and the Treaty of 1873 with Denmark which applied in the present case,<sup>54</sup> do literally require nothing more of an English magistrate than this, the result is a rather surprising one, and not only because of the common practice of a century. It does not appear unreasonable to require the requesting State to specify, in addition to the facts on which the claim is based, the offence those facts are said to disclose.<sup>55</sup> Questions of foreign law and evidence can then, unless the treaty otherwise provides, be left to the foreign court; but the magistrate in the requested State ought to be able to determine whether the asserted offence falls within the description of an extradition crime. Such a power might conceivably be extracted from the definition of 'fugitive criminal' in section 26 of the Act,<sup>56</sup> but the tenor of Lord Diplock's speech—strongly reaffirmed in the later case of *United States Government v. McCaffery*<sup>57</sup>—is against such an interpretation. This is regrettable, in that it should be a matter for the courts, rather than the Home Secretary, to determine whether basic requirements for extradition have been met.

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<sup>51</sup> At p. 91.

<sup>52</sup> Cf. the USA-UK Extradition Treaty of 8 June 1972 (SI 1976, No. 2144) Article XII (1) ('an extraditable offence established by the facts in respect of which his extradition has been granted'); this language appears wider than that of section 3 (2) of the 1870 Act ('the extradition crime'), but on Lord Diplock's view there appears to be no difference between the two.

<sup>53</sup> Under section 11 of the Act the Secretary of State has a discretion not to proceed with an extradition.

<sup>54</sup> Treaty of 31 March 1873: *British and Foreign State Papers*, vol. 63, p. 5; SR & O 1936, No. 405.

<sup>55</sup> Article II of the treaty with Denmark certainly assumes that the 'offence' under the requesting State's law will be specified; and cf. Article VI ('the particular offence on account of which he was surrendered').

<sup>56</sup> The definition requires that the person be 'accused . . . of an extradition crime committed within the jurisdiction' of the foreign State. But it could well be argued that the term 'extradition crime' in this definition has the meaning stipulated by section 26 itself, which apparently refers only to English law.

<sup>57</sup> [1984] 2 All ER 570. See also *R v. Governor of Pentonville Prison, ex parte Mancini*, [1984] Times LR 523.



## B. PRIVATE INTERNATIONAL LAW\*

*Jurisdiction: service of process out of the jurisdiction in a tort action*

*Case No. 1.* One of the cases in which an English court may in its discretion allow service of a writ upon a defendant not personally present within the jurisdiction is that in which 'the action begun by the writ is founded on a tort committed within the jurisdiction'. This provision of the Rules of the Supreme Court, Order 11, rule 1 (1) (h), has been the source of a considerable body of case law concerning the location of a tort. It is interesting to note that in an apparent attempt to clarify the position the corresponding provision of the new Order 11, rule 1 (1) (which is due to come into force at the same time<sup>1</sup> as the bringing into operation of the major part of the Civil Jurisdiction and Judgments Act 1982), runs as follows: 'the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction'.<sup>2</sup> Early doubts as to the location of a tort for the purposes of the present provision tended to centre on the question as to whether a tort is to be regarded as having been committed in the place where the defendant acted or in the place where the plaintiff sustained damage. The wording of the new provision is apparently designed to resolve the problem if formulated in that way: a tort will be deemed to have been committed within the jurisdiction if, either the defendant had acted there, or the damage had been sustained there. More latterly, however, the test for the purposes of the present provision has been formulated more flexibly and has involved looking to the 'substance of the wrong doing'.<sup>3</sup> In *Castree v. E. R. Squibb & Sons Ltd.*<sup>4</sup> Ackner LJ (with whom the other two members of the Court of Appeal agreed) said: 'applying the test which is accepted on all sides to be the appropriate test, namely, to look back over the series of events constituting the tort and to ask the question where in substance the cause of action arose, I would conclude that it arose in this country'.<sup>5</sup> There is room for the view that reformulation along these lines in the new Order 11 would have been preferable to that actually adopted and set out above. It is perhaps unlikely that a situation will arise in which the 'substance of the wrongdoing' was within the jurisdiction although the defendant acted abroad and the plaintiff sustained damage abroad. However, the occurrence of the converse situation is by no means improbable: either a defendant may have acted within the jurisdiction or a plaintiff may have incurred damage there, but viewed broadly the 'substance of the wrongdoing' may have been elsewhere. It is to be noted, too, that the defendant's act may have been a composite one committed partly within and partly without the jurisdiction. Again, the plaintiff may have sustained damage in more than one country. Is it appropriate that, for example, a court should have the power to permit service upon an absent defendant simply because a trivial

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<sup>1</sup> The anticipated date for this has been postponed several times. Current conjecture is that it will be late in 1985 or early in 1986.

<sup>2</sup> SI 1983 No. 1181 (L 21), Rules of the Supreme Court (Amendment No. 2) 1983, para. 7, by which Order 11, rule 1, is amended.

<sup>3</sup> *Cordova Land Co. Ltd. v. Victor Bros. Inc.*, [1966] 1 WLR 793, an early case in which this approach was taken, *per* Winn J at p. 801.

<sup>4</sup> [1980] 1 WLR 1248.

<sup>5</sup> *Ibid.* 1252.

fraction of that damage was sustained within its jurisdiction? In these various cases, of what might be seen as an exorbitant power, the Court will, of course, be able to have resort to its discretion in order to refuse leave to serve the absent defendant. This could, nevertheless, be regarded as reflecting an inadequacy in the formulation of Order 11, rule 1 (1), since its main purpose is to define the limits of that discretion. It is, however, to be noted that the European Court of Justice has construed the corresponding provision<sup>6</sup> of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to the effect that a defendant may be sued 'in matters relating to tort, delict, or quasi delict, in the courts for the place where the harmful event occurs', as referring both to the place where the defendant acted and to the place where the damage was incurred.<sup>7</sup> Although, other things being equal, there would be something to be said for an English court in the future having power to assume jurisdiction in international cases on grounds generally similar to those in which it will enjoy such jurisdiction in many EEC cases, it is to be remembered that the force of the arguments, often judicially expressed in the past for exercising extreme caution in granting leave, will be in no way impaired in international cases falling outside the Convention when it becomes operative in England.

There is a further line of English authority concerned with the present rule 1 (1) (h), which is to the effect that, in the words of Lord Denning MR in *Diamond v. Bank of London and Montreal*,<sup>8</sup> 'The truth is that each tort has to be considered on its own to see where it is committed. . . . Every tort must be considered separately'. Clearly the law of tort or delict covers a wide and diverse range of civil wrongs, and a rigid simplistic rule of indiscriminate applicability couched in terms of the place of the defendant's act or the place of the plaintiff's damage is also undesirable on this score. The need for each type of tort to be considered separately could, however, be accommodated within a test based upon the 'substance of the wrongdoing': the nature of a particular tort would obviously then be a factor to be considered by the court when deciding whether or not it was substantially perpetrated within the jurisdiction. Obviously, too, more precise criteria would in practice tend to crystallize in respect of particular torts. This, although not always articulated, has in fact happened. For instance, it is now well settled that the tort of defamation will generally be deemed to have been committed within the jurisdiction if there has been publication there, even though the allegedly defamatory words were uttered elsewhere and have additionally been published elsewhere.<sup>9</sup> So, too, in the recent case of *The Albaforth*<sup>10</sup> the Court of Appeal, following earlier authority,<sup>11</sup> has held that the tort of negligent misrepresentation is committed where the representation is received and acted upon.

In *The Albaforth* plaintiff shipowners were claiming damages against the defendant bank for negligent misstatement contained in a telex message sent from New Jersey to London, in reliance upon which the plaintiff had contracted with a third party and had suffered loss. The Court of Appeal, allowing an appeal from Staughton J, held that leave to serve the writ out of the jurisdiction should be

<sup>6</sup> Article 5 (3).

<sup>7</sup> *Handelskwekerij G.J. Bier BV and Another v. Mines de Potasse d'Alsace S.A.*, [1978] 1 QB 709.

<sup>8</sup> [1979] QB 333, 334-6.

<sup>9</sup> *Bata v. Bata*, [1948] WN 366. See, too, the Ontario Supreme Court case of *Jenner v. Sun Oil Co.*, [1952] 2 DLR 526.

<sup>10</sup> *Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey ('The Albaforth')*, [1984] 2 Lloyd's Rep. 91.

<sup>11</sup> *Diamond v. Bank of London and Montreal*, [1979] QB 333.

permitted. In so holding the Court found that the alleged tort had been committed within the jurisdiction and that the judge had erred in exercising his resulting discretion in the defendant bank's favour. On the issue of the location of the tort, Robert Goff LJ cited Lord Pearson's conclusion in *Distillers Co. (Biochemicals) Ltd. v. Laura Ann Thompson*<sup>12</sup> that the right approach was when the tort was complete to 'look back over the series of events constituting it and ask the question, where in substance did the cause of action arise?'<sup>13</sup> In *The Albaforth* the Court of Appeal, following its earlier decision in *Diamond v. Bank of London and Montreal Ltd.*,<sup>14</sup> seems to have accepted that almost invariably the substance of the tort of negligent misstatement is to be regarded as having been located in the place where the representation is received and acted upon. At the same time it seems to be implicit in Ackner LJ's judgment that the position would need to be reconsidered in a case in which receipt of the misstatement and active reliance upon it had taken place in different countries.

In some ways the more interesting aspect of *The Albaforth* decision is to be found in their Lordships' holding on the discretion point and the relationship between this and the location of the tort. Order 11, rule 4 (2), of the Rules of Supreme Court provides that leave shall in any event not be granted 'unless it shall be made sufficiently to appear to the Court that the case is a proper one for the service out of the jurisdiction under this Order'.<sup>15</sup> This was the issue upon which the owners had failed to satisfy Staughton J. However in the Court of Appeal Ackner LJ accepted that

the jurisdiction in which a tort has been committed is *prima facie* the natural forum for the determination of the dispute. England is thus the natural forum for the resolution of this dispute. . . . [T]he Judge's exercise of his discretion must be set aside and . . . this Court thus becomes entitled to exercise an original discretion of its own.<sup>16</sup>

Robert Goff LJ said:

If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum. Certainly, in the present case, I can see no factors which could displace that conclusion.<sup>17</sup>

It would seem clear, therefore, first that in exercising its discretion the Court was strongly influenced by the notion of the natural *forum*, and secondly that it accepted that, when the discretion is grounded on the fact that the alleged tort was committed within the jurisdiction, that jurisdiction will almost always be the natural *forum*. At the same time it is to be noted that Ackner LJ expressly adopted<sup>18</sup> observations made by Lord Wilberforce in the recent House of Lords case of *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*<sup>19</sup> There Lord Wilberforce said:

The rule [r. 4 (2)] does not state the considerations by which the court is to decide whether the case is a proper one, and I do not think that we can get much assistance from

<sup>12</sup> [1971] AC 458.

<sup>13</sup> Ibid. 468, cited by Robert Goff LJ in *The Albaforth* at p. 96.

<sup>14</sup> [1979] QB 333.

<sup>15</sup> This wording is unchanged in the new Order 11. See nn. 1 and 2, above.

<sup>16</sup> [1984] 2 Lloyd's Rep. 91, 94.

<sup>17</sup> Ibid. 96.

<sup>18</sup> Ibid. 94-5.

<sup>19</sup> [1984] AC 50.

cases where it is sought to stay an action started in this country, or to enjoin the bringing of proceedings abroad. The situations are different. . . . The intention [of r. 4 (2)] must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and practical issues involved, . . . availability of witnesses and their evidence and expense.<sup>20</sup>

Two comments may be made. The first is provoked by the citation of Lord Wilberforce's words. The second relates more generally to the role of the notion of the natural *forum* in the exercise of the discretion to grant or withhold leave to serve an absent defendant.

There is clearly a significant difference in regard to the burden of proof between the exercise by a court of a discretion to stay English proceedings (or to enjoin the institution or continuation of foreign proceedings) on the one hand, and on the other hand the exercise by a court of the discretion to allow service out of the jurisdiction. In spite of recent relaxations,<sup>21</sup> a substantial burden still initially rests upon a defendant seeking a stay of English proceedings (or upon a foreign defendant who seeks to enjoin the institution or continuance of foreign proceedings), whereas in an application for leave to serve an absent defendant it is the applicant plaintiff who bears the burden of persuading the court that the case is a 'proper' one for service out of the jurisdiction. However, at the substantive law level there would seem, with all respect, to be considerable overlap between the range of factors that may be appropriately considered in the two different contexts. In order to justify a stay the defendant must as a first step 'satisfy the court that there is another *forum* to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense'.<sup>22</sup> If this is done the court will then as a second step have to consider whether a stay would 'deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court'.<sup>23</sup> In the event of a finding of such deprivation, the court will then have to weigh the interests of the parties in order to explore what in *The Atlantic Star*<sup>24</sup> Lord Wilberforce designated 'the critical equation' of these interests. In exercising its discretion to grant leave to serve an absent defendant the court's purpose is indeed different: the issue then is as to whether the circumstances justify the exceptional exercise of what elsewhere has been called a 'long-arm' jurisdiction. However, it is the present writer's submission that neither the difference in the incidence of the burden of proof, nor the difference of purpose, nor the difference of general juridical framework within which the discretions are respectively operating, precludes substantial similarity in the factors properly to be taken into account in the two contexts. The overlap may well be incomplete, and indeed the degree of such overlap must vary with the circumstances, as too will the weight to be attached to particular factors. At the same time it would obviously be unsatisfactory if a court were to allow service out of the jurisdiction and then, in the absence of the emergence of any new relevant factor, to stay the ensuing English proceedings.

<sup>20</sup> [1984] AC. 50, 72.

<sup>21</sup> See *The Atlantic Star*, [1974] AC 436; *MacShannon v. Rockware Glass Ltd.*, [1978] AC 795; *Castanho v. Brown and Root (UK) Ltd.*, [1981] AC 557; *The Abidin Daver*, [1984] AC 398.

<sup>22</sup> *MacShannon v. Rockware Glass Ltd.*, [1978] AC 795 *per* Lord Diplock at p. 812.

<sup>23</sup> *Ibid.*, *per* Lord Diplock at p. 812.

<sup>24</sup> *The Atlantic Star*, [1974] AC 436, 468.

The second comment is that it must at the same time be remembered that, whatever the role of the notion of the natural *forum* may or may not<sup>25</sup> be in the case of an application for a stay, the notion will not always be the dominant consideration influencing the court in the exercise of its discretion under Order 11. In some circumstances other factors may be more important. For example, leave may be refused in the exercise of the court's discretion owing to the plaintiff's failure to show a sufficiently good arguable case on the merits of his claim. Indeed, this is what happened in *Diamond v. Bank of London and Montreal*,<sup>26</sup> the case followed in *The Albaforth* on the location of the tort point. In the former case the Court of Appeal held that, when fraudulent and negligent representations were made by telex or telephone calls originating outside the jurisdiction, the substance of the tort was committed within the jurisdiction where they were received and acted upon. Nevertheless leave had been properly refused by the judge in the exercise of his discretion because it was, in the words of Lord Denning MR, 'impossible to say that [the plaintiff had] a good arguable case for damages so as to justify leave to serve out of the jurisdiction'.<sup>27</sup> Stephenson LJ agreed that the court 'should not exercise [its] discretion in the plaintiff's favour because he has not made out a good arguable case . . .'.<sup>28</sup> The third member of the court, Shaw LJ, said: 'There may be enough to give rise to a prima facie case, but not enough to suggest a good arguable case. . . . I am not satisfied that there is sufficient to justify this court in exercising its discretion'<sup>29</sup> in favour of the plaintiff.

### *Jurisdiction to stay proceedings*

*Case No. 2.* In the course of little more than a decade there has been a most striking change in the way in which an English court is to exercise its discretion to stay otherwise properly brought proceedings in private international law situations. The landmark cases in the process of change have been three decisions of the House of Lords—*The Atlantic Star*<sup>30</sup> in 1974, *MacShannon v. Rockware Glass Ltd.*<sup>31</sup> in 1978, and most recently *The Abidin Daver*.<sup>32</sup> Before 1974 a defendant seeking to stay the proceedings of a jurisdictionally competent English court was generally faced with a daunting task: a heavy burden was placed upon him to demonstrate that 'the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way' and, moreover, that a stay could not 'cause an injustice to the plaintiff'.<sup>33</sup> Now in 1984 matters are much more (but very properly not entirely) evenly balanced between the parties, and in *The Abidin Daver* Lord Diplock has been able to express the view, at least in cases in which litigation is pending or in prospect in a foreign court, that the position in which an English court finds itself is really 'indistinguishable' from that of a Scottish court applying the doctrine of *forum non conveniens*.<sup>34</sup> The focus of that doctrine is upon the appropriateness of a *forum*.<sup>35</sup>

The facts of *The Abidin Daver* were these. In March 1982 a collision occurred in the Bosphorus, an international waterway but in Turkish territorial waters, between a ship owned by a Cuban state corporation and a ship owned by a Turkish

<sup>25</sup> See pp. 354–5, below.

<sup>26</sup> [1979] QB 333.

<sup>27</sup> Ibid. 348.

<sup>28</sup> Ibid. 350.

<sup>29</sup> Ibid. 351.

<sup>30</sup> [1974] AC 438.

<sup>31</sup> [1978] AC 795.

<sup>32</sup> [1984] AC 398.

<sup>33</sup> *per* Scott LJ in *St. Pierre v. South American Stores Ltd.*, [1936] 1 KB 382, 398.

<sup>34</sup> [1984] AC 398, 411.

<sup>35</sup> See Lord Kilbrandon, in *The Atlantic Star*, n. 30, above, at p. 475.

state corporation. Each blamed the other for the collision and accordingly claimed to be entitled to recover damages. The Cuban vessel was arrested in Turkish territorial waters at the suit of the Turkish owners, who in April 1982 instituted proceedings in the Turkish courts against the Cuban owners. In June 1982 the Cuban owners, as plaintiffs, brought an action in England against the Turkish owners as defendants. On the defendants' motion to stay these English proceedings, Sheen J found that the Turkish court was a *forum* in which justice could be done between the parties at substantially less inconvenience and expense and that a stay would not deprive the plaintiffs of any legitimate personal or juridical advantage. He therefore ordered a stay. The Court of Appeal allowed an appeal by the plaintiffs, but the House of Lords on further appeal by the defendants unanimously reversed the decision of the Court of Appeal and held that Sheen J had rightly exercised his discretion in staying the English proceedings. The two leading judgments in the House of Lords were those of Lord Diplock and Lord Brandon of Oakbrook. *The Abidin Daver* is an important case and in several ways.

First, it seems to go a long way towards establishing that pre-eminence is to be accorded to the reformulation, essayed by Lord Diplock (and in this note to be referred to without disrespect as the Diplock formula) in *MacShannon v. Rockware Glass Ltd.*,<sup>36</sup> of Scott LJ's famous, but now outmoded, dictum in *St. Pierre v. South American Stores Ltd.*<sup>37</sup> While not demurring from Scott LJ's prefatory words that 'A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused', Lord Diplock in the *MacShannon* case restated the ensuing formulation thus:

In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the court that there is another *forum* to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense, and (b) the stay must not deprive the plaintiff of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of the English court.<sup>38</sup>

In *The Abidin Daver* Sheen J had clearly reasoned and decided on the basis of this reformulation. Lord Brandon in the House of Lords, having cited the Diplock formula and having referred to Sheen J's clear reliance upon it, stated that the question as to 'whether the judge directed himself correctly with regard to the principles in accordance with which he was obliged to exercise his discretion could only be answered in the affirmative'.<sup>39</sup> Lord Templeman said:

There was ample material from which Sheen J came to the conclusion that the Sariyer District Court of Turkey is a *forum* in which justice can be done between the parties at substantially less inconvenience and expense and that a stay of the English proceedings will not deprive the Cuban owners of a legitimate personal or jurisdictional [*sic*] advantage which will be available to the Cuban owners if they invoke the jurisdiction of the English court. In other cases, where these conditions are not satisfied, English proceedings will not be stayed merely because of the dangers and difficulties of concurrent actions.<sup>40</sup>

Lord Edmund-Davies cited a passage from Sheen J's judgment having the concluding words:

<sup>36</sup> [1978] AC 795.

<sup>37</sup> See n. 33, above.

<sup>38</sup> [1978] AC 795, 812.

<sup>39</sup> [1984] AC 398, 421.

<sup>40</sup> *Ibid.* 425.

Since I have formed the view that the litigation between the parties to this action arising out of the collision can be much more conveniently tried in the District Court of Sariyer and that the plaintiff will not suffer any juridical disadvantage from trial at Sariyer, it follows that justice demands that this action be stayed.<sup>41</sup>

His Lordship's confirmed comment on the passage was 'Wasn't he right?'.<sup>42</sup> Lord Keith of Kinkel in a brief judgment held that, the instant case being one in which England was not 'the natural forum', the principle to be applied was one very similar to that embodied in the Diplock formula and his Lordship went on to hold that 'on a proper application of the principle I have set out, Sheen J correctly concluded that a stay should be granted'.<sup>43</sup> The only explicit reference by Lord Diplock himself to his earlier reformulation was in connection with his consideration of the significance of the fact that there was a *lis alibi pendens*.<sup>44</sup> Having regard to the apparent virtual unanimity of their Lordships in the matter, it can now be asserted with some confidence that the Diplock formula constitutes the basis of the modern law.

In one respect that formula has been clarified or modified. Lord Brandon drew attention to the omission, in relation to the second arm—(b)—of the formula, of any reference to burden of proof. It would now seem to be settled that, although the legal burden of proof is clearly on the defendant in relation to the first arm—(a)—of the formula, it is on the plaintiff in relation to this second arm. Lord Diplock himself (when considering the weight to be attached to the *lis alibi pendens* factor) spoke of the requirement that 'the would-be plaintiff can establish objectively by cogent evidence that there is some personal or judicial [*sic*] advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it'.<sup>45</sup> Lord Keith said: 'The plaintiffs have entirely failed to demonstrate any reasonable justification for their choice of the English *forum* in the shape of a legitimate forensic or personal advantage'.<sup>46</sup> There is nothing in the judgments of the remaining two Law Lords, Lord Edmund-Davies and Lord Templeman, that is inconsistent with the view that it is for the plaintiff to prove deprivation of a legitimate personal or juridical advantage.<sup>47</sup>

Lord Diplock devotes a considerable part of his judgment to the significance of the *lis alibi pendens* factor—i.e. of the circumstance that proceedings were in train elsewhere. *MacShannon v. Rockware Glass Ltd.*,<sup>48</sup> the source of the Diplock formula, had not been such a case. In *The Abidin Daver*, Lord Diplock concluded:

Where a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate *forum* for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can

<sup>41</sup> Ibid. 415.

<sup>42</sup> Ibid. 414.

<sup>43</sup> Ibid. 416.

<sup>44</sup> Ibid. 408.

<sup>45</sup> Ibid. 412.

<sup>46</sup> Ibid. 416.

<sup>47</sup> The suggestion in Dicey and Morris, *The Conflict of Laws* (10th edn., 1980), p. 250, that 'the evidential burden passes to the plaintiff to justify his choice of the English court, but the legal burden remains on the defendant' must now be discarded.

<sup>48</sup> See n. 31, above.

establish objectively by cogent evidence that there is some personal or judicial advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it.<sup>49</sup>

In short, the pendency of the proceedings in another *forum* is no more than a factor which operates within the framework of the Diplock formula, but it will often be a very weighty factor. Later in his judgment Lord Diplock went on to doubt whether any advantage, allegedly arising from the fact of appearance as plaintiff rather than as defendant in proceedings, would often be sufficiently real to qualify as a legitimate advantage. Lord Brandon in the course of his judgment said: 'Similarly, the mere disadvantage of multiplicity of suits cannot of itself be decisive in tilting the scales: but multiplicity of suits involving serious consequences with regard to expense or other matters, may well do so.'<sup>50</sup> He went on to point out that,

if concurrent actions in respect of the same subject matter proceed together in two different countries, as seems likely if a stay is refused in the present case, one or other of two undesirable consequences may follow: first, there may be two conflicting judgments of the two courts concerned; or, secondly, there may be an ugly rush to get one action decided ahead of the other, in order to create a situation of *res judicata* or issue estoppel in the latter.<sup>51</sup>

It is noteworthy, but in the view of the present writer not altogether to be welcomed without reservation, that Lord Diplock took the opportunity to opine that the extent to which during the previous decade 'judicial chauvinism has been replaced by judicial comity' made the time ripe to acknowledge frankly that the position is 'in the field of law with which this is concerned, indistinguishable from the Scottish legal doctrine of *forum non conveniens*'.<sup>52</sup> Whether by 'the field of law with which this is concerned' Lord Diplock meant jurisdiction to stay generally, or only jurisdiction to stay in a *lis alibi pendens* situation, is not altogether clear. In either event there is perhaps a risk in open acknowledgement of the reality: it is the risk that a body of Scots case law may be seen to have become authoritative in England. That much benefit may well be derived from studying the wealth of Scots authority cannot be gainsaid; but for an isolated body of Scots law torn from its Scottish procedural context to become actually authoritative in England would be a development not to be contemplated with equanimity.

An uncertainty that has perhaps survived *The Abidin Daver* is as to the aptness of the concept of 'the natural *forum*'. If this phrase does no more than denote the *forum* which under the first arm of the Diplock formula the defendant is obliged to identify, its role is no more than that of an alternative label. However, Lord Keith did say in *The Abidin Daver*, 'By "the natural *forum*" I mean that with which the action had the most real and substantial connection'.<sup>53</sup> This could be seen as denoting a sort of objectively determined 'proper *forum*' of the dispute—a *forum* with which factually the dispute is seen as being most closely connected geographically and otherwise. This would contrast with the emphasis of the Diplock

<sup>49</sup> [1984] AC 398, 411-12.

<sup>50</sup> *Ibid.* 423.

<sup>51</sup> *Ibid.* 423-4; see too Lord Diplock at p. 412.

<sup>52</sup> The headnote in the Law Reports ascribes agreement with this to Lord Edmund-Davies, Lord Keith and Lord Templeman. This seems to be scarcely warranted as none of these three Law Lords (nor Lord Brandon) emphasized the point specifically, although Lord Keith did express general concurrence with Lord Diplock, and Lord Edmund-Davies and Lord Templeman general concurrence with both Lord Diplock and Lord Brandon.

<sup>53</sup> [1984] AC 398, 415.

formula upon the respective interests of the parties. The ultimate purpose of civil litigation is to do justice between the parties, and the introduction of the alien and semi-mystical notion of 'the natural *forum*' in such a sense must be viewed with some apprehension. It would not be warranted, either as a pre-condition for operation of the Diplock formula, or as an essential ingredient of the first arm of that formula. Moreover, if a defendant discharges the obligation placed upon him under the first arm of the formula, and the plaintiff also discharges the obligation placed upon him under its second arm, the court must then be faced with what Lord Wilberforce felicitously referred to in *The Atlantic Star* as 'the critical equation'.<sup>54</sup> The court must, as Lord Wilberforce said, 'take into account (i) any advantage to the plaintiff, (ii) any disadvantage to the plaintiff'. It must then strike a balance. This task may as Lord Wilberforce conceded sometimes be a difficult one. It is, however, not to be side-stepped by any attempted location of the dispute by way of some sort of misplaced analogy with the objective determination (in the absence of a choice of law clause) of the proper law of a contract. This is not to say that some of the factors which might be considered relevant in such an attempted determination may not have a proper bearing upon the interests of the parties: for instance, Lord Brandon, in cataloguing the factors which Sheen J had properly taken into account in exercising his discretion to stay the English proceedings, included the fact that the collision had occurred in Turkish waters and that one of the ships was a Turkish ship manned by a Turkish crew resident in Turkey.<sup>55</sup>

As more and more cases come to be decided wisdom will accumulate concerning the nature of the factors that can properly be taken into account when considering and assessing 'substantially less inconvenience or expense' and 'legitimate personal or juridical advantage'. It may be noted in this connection that it was emphatically confirmed by Lord Brandon in *The Abidin Daver* that the trial judge had been right to decline expressly 'to enter into any comparison between the capacities of the Turkish and English courts to try justly and satisfactorily the dispute between the parties';<sup>56</sup> and Lord Diplock said: 'This House . . . has recently<sup>57</sup> endorsed the view that it is quite inappropriate for English judges to undertake any such supposed comparison or to allow the exercise of their discretion to stay an English action to be influenced by it.'<sup>58</sup> In this particular regard, too, judicial chauvinism now stands at a discount.

### *Jurisdiction to restrain foreign proceedings*

*Cases Nos. 3 and 4.* In *Castanho v. Brown and Root (UK) Ltd.*<sup>59</sup> Lord Scarman, in the course of delivering a judgment in the House of Lords with which all the other Law Lords<sup>60</sup> agreed, said:

I turn to consider what criteria should govern the exercise of the courts' discretion to impose a stay or grant an injunction. It is unnecessary now to examine the earlier case law. The principle is the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings.<sup>61</sup>

<sup>54</sup> [1974] AC 436, 468.

<sup>55</sup> [1984] AC 398, 421.

<sup>56</sup> Ibid. 424.

<sup>57</sup> *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*, [1984] AC 50.

<sup>58</sup> [1984] AC 398, 410.

<sup>59</sup> [1981] AC 557.

<sup>60</sup> Lords Wilberforce, Diplock, Keith of Kinkel and Bridge of Harwich.

<sup>61</sup> [1981] AC 557, 574.

The central issue in the *Castanho* case had been as to propriety of an English court seeking to restrain by way of injunction proceedings in a court in the United States. Earlier in his judgment Lord Scarman had said:

Caution in the exercise of the jurisdiction is certainly needed: but . . . the injunction can be granted against a party properly before the court, where it is appropriate to avoid injustice.<sup>62</sup>

In the recent case of *Metall und Rohstoff AG v. ACLI Metals (London) Ltd.*<sup>63</sup> the Court of Appeal discharged an injunction that had been granted by Staughton J restraining appellants from continuing New York proceedings. But in the course of his judgment Ackner LJ said:

I do not consider there can be any doubt but that the learned Judge properly directed himself as to the law in the following respects: 1. . . . that to justify the grant of the injunction it had to be established 1 (a) that the English Court is a *forum* to whose jurisdiction the appellant is amenable and in which justice can be done at substantially less inconvenience and expense (the *forum conveniens*) and (b) that the injunction would not deprive the appellant of a legitimate personal or juridical advantage which would be available to it in the American proceedings. 2. That the jurisdiction to restrain proceedings abroad is to be exercised with extreme caution. 3. That the principles governing the exercise of the Court's discretion are the same whether the remedy sought is a stay of English proceedings or a restraint upon foreign proceedings.<sup>64</sup>

The injunction was nevertheless discharged because, although the trial judge had properly directed himself on the law, he had been in error in concluding that an English action, which had already been commenced between the same parties and concerning the same subject-matter, was almost certain to be tried first and that this was a powerful factor to be weighed in the balance, and moreover he had erred in his conclusion that there was a clear right under English law to claim punitive damages. The Court of Appeal held that in the circumstances there was in fact a solid preponderance of disadvantage to the defendants over any advantage to the plaintiffs to whom the trial judge had granted an injunction. The 'critical equation' should, therefore, be resolved in the defendants' favour, and accordingly they should not be prevented from proceeding as plaintiffs in New York. Parker LJ added that 'if the New York proceedings are to be stopped at all, they should be stopped by order of the Court in which they have been brought'.<sup>65</sup>

The main general interest of the Court of Appeal decision perhaps lies in the affirmation of doctrine, which is embodied in Ackner LJ's approval of the trial judge's direction as to the law. The proposition, first enunciated by Lord Scarman in *Castanho v. Brown and Root (UK) Ltd.*<sup>66</sup> and followed in that direction, to the effect that the same principle is applicable when the remedy sought is an injunction in respect of foreign proceedings as is applicable when a stay of English proceedings is sought, must, if viewed in isolation, elevate eyebrows. Surely, it might then plausibly be contended, a court ought on policy grounds to be less reluctant to limit its own availability than it should be to make an order which, notwithstanding doctrinal rationalization, smacks of interference with the actual or anticipated proceedings of a foreign court. Moreover, as a matter of authority neither of the recent House of Lords cases, *The Atlantic Star*<sup>67</sup> and *MacShannon v. Rockware Glass Ltd.*,<sup>68</sup> had been in any way concerned with restraining foreign

<sup>62</sup> [1981] AC 557, 573.

<sup>63</sup> [1984] 1 Lloyd's Rep. 598.

<sup>64</sup> Ibid. 602.

<sup>65</sup> Ibid. 614.

<sup>66</sup> See n. 61, above.

<sup>67</sup> [1974] AC 436.

<sup>68</sup> [1978] AC 795.

proceedings. Nor for that matter was *St Pierre v. South American Stores Ltd.*<sup>69</sup> In a leading authority on the power to restrain a person from suing in a foreign *forum* Scrutton LJ said:

... the *burden is on the person asking for relief* from the English court to satisfy it that the plaintiff in the foreign court cannot obtain *any* advantage from the foreign procedure that he would not obtain in the English court. It is not *prima facie* vexatious for the same plaintiff to commence two actions relating to the same subject matter, one in England and one abroad. The applicant must prove a *substantial* case of vexation. . . .<sup>70</sup>

The test propounded by Scrutton LJ may have resembled that laid down by Scott LJ in the *St Pierre* case for application when a stay of English proceedings is sought; but, it could be argued, it ought not to follow that, simply because the *St Pierre* test has now been drastically modified, the test laid down in *Cohen v. Rothfield* should be correspondingly modified. A new approach that has been evolved in order to effect a much needed liberalization of one part of the law (that relating to the staying of English proceedings) should not be seen as being applicable to a different branch of the law which either does not need liberalizing or at least does not need parallel liberalization.

It is submitted that a substantial response to this line of argument must be that the proposition that 'the principle' is now the same in both contexts is not to be considered simplistically and in isolation. In the instant case, *Metall und Rohstoff AG v. ACLI Metals (London) Ltd.*,<sup>71</sup> the first of the trial judge's statements of the law, approved by Ackner LJ and set out above, obviously reflects the obverse of Lord Diplock's revision in the *MacShannon* case of Scott LJ's well-known, but now discarded, formulation of the rule to be applied in cases in which a stay is being sought.<sup>72</sup> The legal frameworks within which the court is to exercise its discretion in the two types of situation can, therefore, now be seen as being *mutatis mutandis* generally similar. However, it should not, and does not, follow from this that within this common framework the balance is to be struck in the same way in the two situations. The point was clearly taken by Parker LJ in the instant case. His Lordship quoted from what Brandon LJ (as he then was) had said in the *Castanho* case (when it was in the Court of Appeal), who after himself citing from the *dictum* of Scrutton LJ in *Cohen v. Rothfield* set out above, had continued:

I agree with that observation and consider that, while the power to compel a plaintiff to sue in another *forum* should itself (as the authorities show) be exercised with caution, the power to compel a plaintiff to sue here by restraining him from proceeding in another *forum* elsewhere should be exercised with even greater caution.<sup>73</sup>

Parker LJ in the instant case specifically added:

In my view, this different approach can and should be given effect by requiring a clearer balance in favour of the defendant [i.e. the applicant] when considering the critical equation in cases where it is sought to stop, by injunction, proceeding in another *forum*, than where it is sought to stop proceedings here.<sup>74</sup>

<sup>69</sup> [1936] 1 KB 382.

<sup>70</sup> *Cohen v. Rothfield*, [1919] 1 KB 410, 413. Italics supplied.

<sup>71</sup> [1984] 1 Lloyd's Rep. 598.

<sup>72</sup> See, too, *Smith Kline Ltd. v. Bloch*, [1983] 1 WLR 730, esp. *per* Ackner LJ at p. 743.

<sup>73</sup> [1980] 1 WLR 833.

<sup>74</sup> [1984] 1 Lloyd's Rep. 598, 613. In the later case of *British Airways Board v. Laker Airways*, [1985] AC 58 (see below), Lord Scarman himself has emphasized (at pp. 95-6) that 'The approach has to be cautious because an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court'.

It would seem to be implicit in this that in an injunction case the burden of proof is still throughout on the applicant and is heavy. It is incumbent upon him to show, not only that England is the more appropriate *forum*, but also that his opponent would not be deprived of any legitimate advantage if he were prevented from suing in the foreign *forum*. This contrasts with the position that has emerged in the case of a stay: in such proceedings the burden is upon the plaintiff to prove such deprivation.

Another recent case in this area of law is *British Airways Board v. Laker Airways*.<sup>75</sup> After the collapse of the Laker 'Skytrain' service to the United States, Laker sued British Airways and British Caledonian Airways in the United States under its anti-trust laws alleging conspiracy to eliminate his company. The defendants applied to the English courts for injunctions to restrain him from proceeding in the United States. This and related litigation finally reached the House of Lords. One of the issues which the House had to decide was as to whether a party should be enjoined from having access to a foreign court in a situation in which the allegation in its complaint against the defendants (being the applicants for the injunction in the English proceedings) would disclose no cause of action in an English court. Lord Diplock, who delivered the leading judgment, although entertaining reservations as to the general appropriateness of the metaphor 'the critical equation', accepted that in 'cases where there are alternative *fora* available one nevertheless understands the idea that it is meant to convey', but he added 'whereas in a single *forum* case there are not even two sides for comparison with one another'.<sup>76</sup> *British Airways Board v. Laker Airways* was such a case. Lord Diplock said of it:

In the result your Lordships are confronted in the civil actions with a case in which there is a single *forum* only that is of competent jurisdiction to determine the merits of the claim; and the single *forum* is a foreign court. For an English court to enjoin the claimant from having access to that foreign court is, in effect, to take upon itself a one-sided jurisdiction to determine the claim upon the merits *against* the claimant but also to prevent its being decided upon the merits *in his favour*. This poses a novel problem, different in kind from that involved where there are alternative *fora* in which a particular civil claim can be pursued.<sup>77</sup>

In these novel circumstances the House held that the onus was upon the British Airways Board and the other plaintiff airline, British Caledonian Airways Ltd., to show that it would be unconscionable, and therefore unjust, for Laker to pursue the action in the United States. This they had failed to do. Lord Scarman, having said that 'Caution is needed even in a *forum conveniens* case, i.e., a case in which a remedy is available in the English as well as in the foreign court. Caution is clearly very necessary where there is no remedy in the English court in respect of the cause of action which, if the facts be proved, is recognized and enforceable by the foreign court', continued:

Nevertheless, even in the latter case, the power of the English court to grant the injunction exists, if the bringing of the suit in the foreign court is in the circumstances so unconscionable that in accordance with our principles of a 'wide and flexible' equity it can be seen to be an infringement of an equitable right of the applicant. . . . This equitable right not to be sued abroad arises only if the inequity is such that the English court must intervene to prevent injustice. Cases will, therefore, be few: but the jurisdiction exists and must be sustained.

<sup>75</sup> [1985] AC 58: for other aspects of this case see pp. 331-6, above.

<sup>76</sup> Ibid. 93.

<sup>77</sup> Ibid. 80.

Lord Scarman, like Lord Diplock, with both of whom Lords Fraser of Tullybelton, Lord Roskill and Lord Brightman agreed, held that the instant case was not one of those few cases.<sup>78</sup>

### *Transnational divorces*

*Case No. 5.* It would be bold to assert that as a model of drafting, the Recognition of Divorces and Legal Separations Act 1971 has proved to be an outstanding success. The sources of some of its shortcomings, however, lie deeper. They derive in part from a failure to take due account of the fact that contemporary England is in significant measure a multiracial and multicultural society. The primary purpose of the 1971 Act was to give effect to the provisions of the Hague Convention on the Recognition of Divorces and Legal Separations. Although perhaps meeting the needs of the typical signatory, that Convention did not make adequate, or at least adequately sophisticated, provision for the needs of a multicultural subscribing country. In an area of law, such as matrimonial relations, in which religious considerations often play an important role this blemish is especially liable to give rise to difficulty. Another, but perhaps not unrelated, source of the shortcomings of the 1971 Act lies in the emphasis placed upon the *locus* of a divorce (or legal separation). In particular it provides that generally speaking an extra-judicial divorce will only be accorded recognition if it takes place outside the British Isles. It will not be recognized if it takes place in the *forum* or in another part of the British Isles.

Section 2 of the Act defines 'overseas divorces' as 'divorces . . . which (a) have been obtained by means of judicial or other proceedings in any country outside the British Isles; and (b) are effective under the law of that country'. Section 3 (1) goes on to provide as follows:

The validity of an overseas divorce or legal separation shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained—(a) either spouse was habitually resident in that country, or (b) either spouse was a national of that country.

Implicit in these sections are three assumptions: first, that divorce proceedings always take place in one single identifiable country, i.e. no account is taken of the possibility that, for example, the country in which the proceedings are instituted or commenced may be different from that in which the divorce is ultimately pronounced; secondly, that it is appropriate that it is with this supposedly single identifiable country that the necessary jurisdictional link (the habitual residence or nationality of a spouse) must exist; thirdly, that it is also appropriate that the threshold requirement of efficacy should be under the law of that country. In the case of a 'transnational' divorce, the first of these assumptions is *ex hypothesi* invalidated and the utility and merits of the second and third assumptions become questionable.

A transnational divorce is one in which the various components of the necessary procedure occur in different countries. It is still a rarity in Western culture-based systems. One reason for this is that divorce by correspondence, including international correspondence (let alone divorce by, for example, telex) is, or is alleged to be, unacceptable. However, what is in effect a transnational divorce may well be a reality under some other systems. A case in point is the modern talaq divorce.

<sup>78</sup> Ibid. 95–6.

It was with the question of recognition of two such divorces that the Court of Appeal was concerned in the recent case of *R v. Home Secretary, ex parte Ghulam Fatima*.<sup>79</sup>

That case arose out of the refusal by British immigration officials of leave to two Pakistani ladies to enter the United Kingdom for the purpose of marrying their fiancés, the grounds of the refusal being that it was unlikely that the intended marriages would take place within a reasonable time because the men's former divorces would not be recognized in England. The ladies applied for judicial review of the decisions of the immigration officers. The trial judge refused their application, finding that the divorces would indeed not be recognized as valid decrees under sections 2 and 3 (1) of the Recognition of Divorces and Legal Separations Act 1971. This decision was affirmed by the Court of Appeal.

The circumstances of the divorces were these. The two men were Pakistanis, settled in England, each of whom had pronounced talaq in England against his wife, the wives being resident in Pakistan. In compliance with the Pakistani Muslim Family Laws Ordinance 1961 each man had sent a written notice, to the effect that he had pronounced the talaq, to the chairman of his local Union Council in Pakistan and to his wife. In accordance with the provisions of the Ordinance, the marriages were dissolved ninety days after the receipt of the notices by the chairman of the local Union Council.

There was no doubt that there had been compliance with the requirements of section 3 (1) (b) of the 1971 Act for the parties were Pakistani nationals throughout. Slade LJ (who delivered the judgment of the Court of Appeal) stated that there had also been compliance with the requirements of section 2 (b).<sup>80</sup> This statement would seem to imply that the divorces were obtained in Pakistan: it was under Pakistani law that the divorces were effective, and the law under which they are required by section 2 (b) to be effective is the law of the country in which they were obtained.

The Court then went on to consider whether there had been compliance with section 2 (a) and it concluded, first that the proceedings did not take place wholly in Pakistan, and secondly that as they took place partly in England and partly in Pakistan they were not 'overseas divorces' for the purposes of section 2 (a). This holding would seem to be inescapable in view of the fact that, as Slade LJ pointed out,

The wording of sections 2 and 3 (1) when read together, in our judgment, make it clear that in using the phrase 'judicial or other proceedings', in the course of its definition of an 'overseas divorce', the legislature contemplated (a) one set of proceedings only; (b) a set of proceedings which had been instituted in the same country as that in which the relevant divorce was ultimately obtained. On any other footing the phrase 'at the date of the institution of the proceedings in the country in which it was obtained' in section 3 (1) would be inept. That phrase in its context manifestly refers to proceedings of any nature mentioned in section 2 (a), that is to say whether of a judicial or other nature.<sup>81</sup>

This finding on the basis of statutory construction that there had been no compliance with section 2 (a) is, with respect, virtually unassailable. However, what is difficult to understand is the consistency of this with the statement (referred to above) that there had been compliance with section 2 (b), for there can have been such compliance only on the basis that the divorces had been obtained in Pakistan.

<sup>79</sup> [1985] 2 QB 190.

<sup>80</sup> Ibid. 204.

<sup>81</sup> Ibid. 208.

However, the rule that actually emerges from *R v. Home Secretary, ex parte Ghulam Fatima* is that the requirement of section 2 (a), that an overseas divorce must have been obtained by means of proceedings in a country outside the British Isles, means that the entirety of the necessary proceedings must have taken place in the overseas country. Presumably, too, although the point did not fall to be decided on the facts of the instant case, even if the proceedings take place in their entirety overseas, this will not suffice to make it an overseas divorce unless they take place in their entirety in the *same* foreign country. Thus, if the talaq had been pronounced not in England but in a, say, Muslim country other than the country (Pakistan) where notice was received by the Union Council chairman, the result would have been no different.

That the position is less than satisfactory is due to the failure of Parliament, when dealing with the matter, to make specific provision for transnational divorces. This in its turn provokes reflection as to why the *locus* or place of a divorce should assume such significance. Its use as a connecting factor will often permit or invite evasion. In the case under review the men could have avoided the impact of section 2 (a) by going to Pakistan to pronounce talaq. There is room for the view that from a policy point of view a transnational divorce, wherever obtained, should be accorded recognition if recognized as valid under the law or laws of the habitual residences of *both* parties at the time at which it was pronounced. This rule should operate without prejudice to recognition under other existing rules. Perhaps, too, a bold and broad-minded legislature in a multicultural society might then even reconsider the position under its own domestic law of a person habitually resident in the country who is a party to a transnational divorce.

P. B. CARTER



## DECISIONS ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS DURING 1984\*

*Responsibility of the State for the performance of delegated duties—the meaning of ‘forced or compulsory labour’ in Article 4 (2)—discrimination as between professions (Article 14)—right to the peaceful enjoyment of one’s possessions (Article 1, First Protocol)*

*Case No. 1. Van der Mussele case.*<sup>1</sup> The Court held unanimously that arrangements under which a Belgian pupil *avocat* was obliged to defend an accused without being entitled to remuneration or reimbursement of his expenses did not involve a breach of Article 4 of the Convention taken on its own, or in conjunction with Article 14, nor of Article 1 of Protocol No. 1.

The applicant in this case was a Belgian lawyer who, while serving his pupillage, was appointed by the Legal Advice and Defence Office of the Antwerp Bar to defend E, a Gambian, on various criminal charges. The applicant acted for E throughout the proceedings and estimated that he put seventeen to eighteen hours work into the case. E was convicted on certain of the charges and subsequently placed at the disposal of the immigration authorities.

The applicant was then notified that he was being released from the case, but because of E’s lack of resources no assessment of fees and disbursements could be made against him. In his application to the Commission Mr Van der Mussele claimed that the above circumstances contravened Article 4 (2) and a number of other articles of the Convention. The Commission ruled that his case was admissible, but dismissed his claims by different majorities on the merits and referred the case to the Court.

Before examining the substance of the claim the Court dealt with an important preliminary issue. In Belgium the provision of legal assistance is arranged not by the State, but by the legal profession, through Legal Advice and Defence Offices set up by the local *Ordre des avocats*. The Government pointed out that there was no legislation obliging *avocats* to accept work assigned to them by an Office and argued that their duty to act for indigent persons derived solely from the professional rules of the *Ordre*. According to the Government, the State prescribed neither the method nor the effect of such appointments and therefore could not be regarded as answerable for any infringement of the Convention that might be occasioned by the profession’s rules.

The Court had no hesitation in rejecting this argument. Under the Convention there is an obligation to provide free legal assistance in criminal cases (Article 6 (3) (c)), while in civil matters such assistance may constitute one of the means of ensuring a fair trial, as required by Article 6 (1). Belgium, said the Court, chose to delegate its obligations in this matter to the *Ordre des avocats*, which was required

\* © J. G. Merrills, 1985. My thanks are due to the Registrar of the Court for his co-operation in the preparation of these notes.

<sup>1</sup> European Court of Human Rights (ECHR), judgment of 23 November 1983, Series A, No. 70. French text authentic. The case was decided by the plenary Court.

by law to set up Legal Advice and Defence Offices for the purpose. Legislation thus compelled the *Ordre* to compel its members to defend indigent persons. In these circumstances the responsibility of the State must be the same as if it had chosen to operate the system itself.

The applicant's first and principal claim was that there had been a breach of Article 4 (2) of the Convention, which provides that 'No one shall be required to perform forced or compulsory labour'. The term 'forced or compulsory labour' is not defined, but the Convention goes on to provide in Article 4 (3) that it shall not include:

- (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

It was common ground that the applicant's services to his indigent client amounted to 'labour' for the purposes of Article 4 (2), because in this context 'labour' includes both manual work and the broader activities connoted by the French term '*travail*'.

A more difficult point was whether the labour involved here could be regarded as 'forced or compulsory'. The Court was clear that in the absence of physical or mental constraint the applicant's labour could not properly be described as 'forced' and that the element of compulsion must involve more than a simple legal obligation. The International Labour Organization's Convention No. 29 defines the term 'forced or compulsory labour' as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily', and the Court held this could provide a starting-point for the interpretation of Article 4 (2).

Observing that if the applicant had refused to defend his client, he would have been subject to sanctions by the *Ordre des avocats*, the Court held that although these were not sanctions of a criminal character, they were sufficiently daunting to be capable of constituting 'the menace of [a] penalty', for the purposes of the Convention.

Whether the applicant could be said to have 'offered himself voluntarily' for the work in issue was a question which admitted of more than one answer. To the majority of the Commission the applicant had consented to the situation by deciding to qualify as an *avocat* and could not now complain. He had gone into the profession with his eyes open and must be taken to have accepted its burdens as the price of its benefits. The Court took a rather different view. In its opinion the important point was not that the applicant chose to enter the legal profession voluntarily, but that he had to accept the obligation to render his services free of charge whether he wanted to or not and that 'his consent was determined by the normal conditions of exercise of the profession at the relevant time'.<sup>2</sup> It followed that his prior consent, without more, was not sufficient to prevent a finding that he had been required to perform compulsory labour.

<sup>2</sup> Judgment, para. 36.

What other factors were relevant? On the basis of its previous jurisprudence on the question the Commission had held that for the purposes of Article 4 (2) the labour in question must not only be performed by a person against his will, but the obligation to carry it out must be 'unjust' or 'oppressive', or its performance an 'avoidable hardship'. Again the Court took a different approach. Holding that the scope of Article 4 (2) can best be appreciated by considering its underlying objectives, the Court found that the right was delimited by the four subparagraphs of Article 4 (3), which, it said, 'are grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs'.<sup>3</sup>

Examining the applicant's circumstances in the light of these considerations, the Court found a number of features to be relevant. It was significant that the services to be rendered were not something unusual, but fell within the normal activities of an *avocat*. Moreover, the services in question were part of the applicant's professional training and the profession of *avocat* enjoys important advantages including an exclusive right of audience before the courts in Belgium. It was also significant that the obligation to which the applicant objected constituted a means of securing for his client the benefit of Article 6 (3) (c) of the Convention: for 'to this extent it was founded on a conception of social solidarity and cannot be regarded as unreasonable'.<sup>4</sup> Finally, the burden on the applicant of performing this work was not disproportionate. The time he had had to spend on the case was not excessive and even if one added similar cases in which he had been appointed to act during his pupillage, it was clear that sufficient time remained for the performance of his paid work.

The Court noted that the applicant did not object to the work in question as such, but rather to the fact that it was unpaid and without reimbursement of expenses. The Court also noted that it appeared to be agreed on all sides that this was an unsatisfactory state of affairs and that legislation had recently been introduced to change matters. The Court was willing to accept that 'lack of remuneration and of reimbursement of expenses constitutes a relevant factor when considering what is proportionate or in the normal course of affairs'.<sup>5</sup> However, it could not agree that in the present case the prejudice to the applicant created an imbalance between his aim to qualify as an *avocat* and the obligations which had to be undertaken to achieve that aim. In view of the fact that the applicant had entered the profession with knowledge of the practice complained of, and the aforesaid absence of disproportion, it could not be said that the services required of the applicant were compulsory notwithstanding his consent. Accordingly, and having regard 'to the standards still generally obtaining in Belgium and in other democratic societies'<sup>6</sup> there was no 'compulsory' labour for the purposes of Article 4 (2).

The applicant's second claim concerned Article 14, which provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

It is clear both from the text and from the Court's jurisprudence that Article 14 is solely concerned with discrimination in relation to 'the enjoyment of the rights

<sup>3</sup> Ibid., para. 38.

<sup>4</sup> Ibid., para. 39.

<sup>5</sup> Ibid., para. 40.

<sup>6</sup> Ibid.

and freedoms' safeguarded by the other substantive provisions and has no independent status. On the other hand, it is equally clear that Article 14 is autonomous in the sense that it can be applied in situations in which there has been no breach of another provision.<sup>7</sup> The present case is a good illustration of this distinction. As already noted, the Court found that there was no breach of Article 4. Explaining, however, that 'the criteria which serve to delimit the concept of compulsory labour include the notion of what is in the normal course of affairs', the Court held that 'work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors',<sup>8</sup> which was what the applicant alleged here.

The applicant's claim in respect of discrimination related not to the allocation of work as between pupil *avocats* and their senior colleagues, but rather to the fact that *avocats* were accorded less favourable treatment than the members of various other professions. In legal aid cases judges, registrars, interpreters and other officials are all paid by the State and arrangements for paying expenses also exist. Medical practitioners, veterinary surgeons, pharmacists and dentists similarly are not required to provide unpaid services to the indigent. In the applicant's submission these were all examples of inequality of treatment, devoid of any 'objective reasonable justification', and consequently there was here a contravention of Articles 14 and 4 taken together.

Although this argument persuaded a minority of the Commission, it was unanimously rejected by the Court on the ground that the cases relied on were not truly comparable. Observing that 'Article 14 safeguards individuals, placed in analogous situations, from discrimination', the Court held that:

... between the Bar and the various professions cited by the applicant, including even the judicial and parajudicial professions, there exist fundamental differences to which the Government and the majority of the Commission rightly drew attention, namely differences as to legal status, conditions for entry to the profession, the nature of the functions involved, the manner of exercise of those functions, etc. The evidence before the Court does not disclose any similarity between the disparate situations in question: each one is characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect.<sup>9</sup>

The Court therefore concluded that there had been no breach of Articles 14 and 4 taken together.

The third and last claim concerned Article 1 of Protocol No. 1 of the Convention which provides for 'the peaceful enjoyment of possessions'. The applicant had not been paid for his work, but in itself this did not contravene Article 1 because, as the Court pointed out, only existing possessions are protected and, since no assessment of fees had been possible in the present case, no debt in favour of the applicant had arisen.

The failure to reimburse Mr Van der Mussele's expenses could not be approached on the same basis since here he had been forced to pay certain sums out of his own pocket. It did not follow, however, that this constituted a breach of the Convention. Pointing out that 'in many cases a duty prescribed by law involves a certain outlay for the person bound to perform it', the Court held that 'to regard the imposition of such a duty as constituting in itself an interference

<sup>7</sup> For an illustration of such an application of Article 14 see the *Marckx* case, Series A, No. 31, and this *Year Book*, 50 (1979), p. 260.

<sup>8</sup> Judgment, para. 43.

<sup>9</sup> *Ibid.*, para. 46.

with possessions for the purposes of Article 1 of Protocol No. 1 would be giving the Article a far-reaching interpretation going beyond its object and purpose'.<sup>10</sup> In the present case the expenses, though not derisory, were small and resulted from an obligation to perform work that was in itself compatible with the Convention. In the circumstances, therefore, Article 1 whether taken alone, or in conjunction with Article 14, was not applicable to the case.

This is not the first case in which the interpretation of Article 4 has been before the Court,<sup>11</sup> but it is certainly the most important. Notable features of the decision are the Court's purposive approach to the Convention, its constructive use of the ILO Convention and the fact that its reasoning differed from that of the Commission in a number of respects. The Court considered that it was unnecessary to consider the scope of Article 4 (3) (d) and whether 'the notion of "normal civic obligations" extends to obligations incumbent on a specific category of citizens by reason of the position they occupy, or the functions they are called upon to perform, in the community'.<sup>12</sup> Another question is whether the routine allocation of cases to pupil *avocats* is consonant with the obligation to provide impecunious litigants with effective legal aid, as required by Article 6 (3) (c).<sup>13</sup> This issue, which may arise, of course, whether or not a pupil *avocat* is paid, was also left open.

*Meaning of 'judgment shall be pronounced publicly' in Article 6 (1)—trial within a reasonable time (Article 6 (1))*

*Case No. 2. Pretto and others case.*<sup>14</sup> The Court held unanimously that the absence of public pronouncement of its judgment by the Italian Court of Cassation in a case concerning the applicants did not contravene Article 6 (1) of the Convention. By a majority of 14 votes to 1 it also held that there had been no breach of Article 6 (1) with regard to the length of proceedings in the case.

The applicants in this case were an Italian tenant farmer and the members of his family whose farm was sold by the owner of the land to a third party by a transaction which, according to Mr Pretto, involved a fictitious price and disregarded his right of pre-emption. In September 1971 Mr Pretto began proceedings in the Vicenza Regional Court against the new owner and in March 1973 won his case. In July 1973 the new owner appealed to the Venice Court of Appeal which, after postponing the hearings three times at the request of both parties, reversed the Regional Court's decision on a point of law. The Court of Appeal's decision was given in October 1974 and deposited in the Court's registry in December. In February 1975 Mr Pretto appealed to the Court of Cassation on the legal issue and the respondent lodged a cross-appeal. Hearings were arranged for February 1976 but were postponed, pending a ruling of the plenary Court in a case on the same point. In October 1976 Mr Pretto's appeal was dismissed in a judgment which was deposited in the Court of Cassation's registry in 1977. In June 1977 the judgment was served on Mr Pretto and became enforceable.

<sup>10</sup> Ibid., para. 49. In a concurring opinion three members of the Court held that there had been no violation of Article 1 of Protocol No. 1 for a rather different reason.

<sup>11</sup> See the *Van Droogenbroeck* case, Series A, No. 50, and this *Year Book*, 53 (1982), p. 314.

<sup>12</sup> Judgment, para. 41.

<sup>13</sup> See the *Artico* case, Series A, No. 37, and this *Year Book*, 51 (1980), p. 332.

<sup>14</sup> ECHR, judgment of 8 December 1983, Series A, No. 71. French text authentic. The case was decided by the plenary Court.

In their application to the Commission in July 1977 the applicants complained that the handling of their case by the Italian authorities had violated Article 6 (1) of the Convention because *inter alia* judgment had not been pronounced publicly and the length of the proceedings had exceeded a reasonable time. The Commission found that these complaints were admissible, but in its report of December 1981 expressed the opinion by majority votes that neither complaint was good on the merits. The Commission then referred the case to the Court.

Article 6 (1) of the Convention provides:

In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by [a] . . . tribunal . . . Judgment shall be pronounced publicly . . .

The first question was whether the fact that the Court of Cassation's judgment had been deposited in the court registry, with written notification of its operative provisions to the parties, but without a reading in open court, was consistent with the requirement that 'Judgment shall be pronounced publicly'.

The Court observed that at first sight the terms of the Convention appear stricter than those of the 1966 International Covenant on Civil and Political Rights<sup>15</sup> and seem to require the reading out of judgments. However, in the light of the fact that many members of the Council of Europe have a long-standing tradition of other means of making judgments public, the Court considered that so literal an interpretation was not required. Instead, it decided that 'in each case the form of publicity to be given to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6 para. 1'.<sup>16</sup>

In an important statement of principle the Court described the latter as follows:

The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society . . .<sup>17</sup>

The special features of the proceedings in the present case were that the role of the Court of Cassation was not to try the case, but merely to review the decision of the lower court on the issue of law; that public hearings had been held; and finally that the decision, though not read out in open court, was readily obtainable from the registry. In the light of these circumstances the Court concluded that the object of Article 6 (1), 'to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial',<sup>18</sup> could as well be achieved by a deposit of the judgment in the registry as by a reading in open court. Accordingly, the absence of a public pronouncement of the Court of Cassation's judgment did not constitute a violation of the Convention.

The other issue in the case, the length of the proceedings before the Italian courts, called only for an application of established principles to the facts and can be dealt with quite briefly. The relevant period ran from 1 August 1973, when Italy accepted the right of individual petition, to 5 February 1977, when the

<sup>15</sup> Article 14 (1) of the Covenant provides that the judgment 'shall be made public' ('*sera public*').

<sup>16</sup> Judgment, para. 26.

<sup>17</sup> Ibid., para. 21.

<sup>18</sup> Ibid., para. 27.

judgment of the Court of Cassation was deposited in the registry. In deciding whether this period of three years, six months and five days had exceeded a reasonable time the Court took into account that the case raised a difficult point of Italian law,<sup>19</sup> and that Mr Pretto, though in no way blameworthy, had conducted his case in a way which had had the effect of prolonging the proceedings. As is usually the case, however, the crucial factor was neither of these elements, but the conduct of the judicial authorities. By a bare majority the Commission concluded that the various phases in the proceedings had been characterized by delays which could probably have been avoided, but that having regard to the case as a whole, the duration of the proceedings could not be regarded as unreasonable. Although one member of the Court took a different view,<sup>20</sup> the majority agreed with the Commission's reasoning and held that on this, as on the previous point, there had been no breach of the Convention.

This is the first of a number of cases in which the Court has been called upon to decide when a judgment can be said to have been 'pronounced publicly'.<sup>21</sup> By eschewing a literal interpretation and referring instead to the object and purpose of the Convention the Court was able to arrive at a sensible conclusion on the particular facts and at the same time to provide some valuable guidance for the future.

*Right to a public hearing (Article 6 (1))—the meaning of 'judgment shall be pronounced publicly' in Article 6 (1)—whether the Court has jurisdiction to evaluate the expediency of the Commission's decision to refer a case to it*

*Case No. 3. Axen case.*<sup>22</sup> The Court held unanimously that the absence of public hearings and a public pronouncement of its judgment by a chamber of the German Federal Court in a case concerning the applicant did not contravene Article 6 (1) of the Convention.

The applicant was involved in a road accident through no fault of his own and instituted proceedings in the German courts against the parties responsible. He was awarded damages, but filed an appeal on points of law with the Federal Court of Justice on the issue of quantum. Acting under the Federal Court of Justice (Reduction of Work-Load in Civil Cases) Act of 1969, the Federal Court decided to dispense with a hearing and dismissed the appeal.

The applicant's first claim was that the proceedings in the Federal Court violated his right to a public hearing under Article 6 (1) of the Convention. The Court agreed with the Commission that such a claim could not be sustained. It emphasized that the lower courts had heard the case in public and that the Federal Court had dispensed with a hearing only because it unanimously considered the

<sup>19</sup> The case raised a novel and controversial point of statutory interpretation on which the European Court held that it was reasonable for a Chamber of the Court of Cassation to await a ruling from the plenary Court.

<sup>20</sup> Judge Pinheiro Farinha dissented on the ground that the conduct of the judicial authorities had involved a great deal of unjustified delay.

<sup>21</sup> See also Cases Nos. 3 and 5 below. In Case No. 11 the related question of when publicity may be dispensed with was considered.

<sup>22</sup> ECHR, judgment of 8 December 1983, Series A, No. 72. French text authentic. The case was decided by the plenary Court.

appeal on points of law to be ill-founded and oral argument to be unnecessary.<sup>23</sup> Thus the decision not to hold a hearing was justified by the special features of the proceedings viewed as a whole.

The second claim was that the judgment of the Federal Court was neither pronounced in open court, nor published, but merely served on the applicant and that this also constituted a violation of Article 6 (1). The issue here was identical to that recently considered in *Pretto* (Case No. 2) and in rejecting the claim the Court made extensive reference to its earlier ruling. Examining the facts in the light of the relevant principles, it pointed out that the Federal Court, which is solely concerned with issues of law, had invited the parties' observations on the procedure proposed and in its decision had confirmed a judgment pronounced in open court. In these circumstances the Court was again satisfied that during the course of the proceedings as a whole the object of Article 6 (1), 'to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial', had been achieved.

The *Axen* case was referred to the Court by the Commission, but not the Government, a point which was underlined when the latter in its oral pleadings contested the expediency of the reference. This was not a preliminary objection in the formal sense. However, in response the Court prefaced its treatment of the merits with a reminder of some elementary features of the Convention. Explaining that it is no part of its function to evaluate the expediency of the decision to bring a case to the Court, it stressed that in this respect both the Commission and the Contracting States are autonomous. To the claim that the Commission's goal was to secure an abstract review of the relevant provisions of German law the Court made the point that in proceedings originating in an individual application it must confine itself, as far as possible, to an examination of the concrete case.

Finally, the Court explained that no weight could be attached to the fact that the Act under which Mr Axen's case had been dealt with was no longer in force, nor that the applicant might be more concerned with securing a variation of the domestic decision, than with the interpretation of the Convention. The change in the law did not have the effect of restoring the applicant's rights, while the object of the proceedings was to secure a ruling on the applicant's complaints. In accordance with the Court's established jurisprudence, there were therefore no grounds on which its competence could be challenged.

*Right to an interpreter in criminal proceedings (Article 6 (3) (e))—the meaning of 'criminal charge' in Article 6 (1) and 'charged with a criminal offence' in Article 6 (3)*

*Case No. 4. Öztürk case.*<sup>24</sup> The Court held that the Federal Republic of Germany had contravened Article 6 (3) (e) of the Convention by requiring the applicant to pay for the use of an interpreter in judicial proceedings concerning a road traffic offence.

The applicant, a Turkish national, resident in Germany, accidentally drove into a parked car, and was fined for breach of the Road Traffic Regulations. He lodged an objection against the decision with the local District Court, but withdrew the

<sup>23</sup> The Court also pointed out that had the Federal Court been minded to allow the appeal, oral argument would have been obligatory under German law.

<sup>24</sup> ECHR, judgment of 21 February 1984, Series A, No. 73. French text authentic. The case was decided by the plenary Court.

objection at the close of the hearing. During the hearing he was assisted by an interpreter and the District Court directed that he should bear the court costs, including the interpreter's fees. When an appeal against the latter part of the order was unsuccessful, Mr Öztürk applied to the Commission, which in its report of May 1982 expressed the opinion by 8 votes to 4 that there had been a violation of Article 6 (3) (e). The Government and the Commission then referred the case to the Court.

Article 6 (3) (e) of the Convention provides:

Everyone charged with a criminal offence has the following minimum rights:

...

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Under German law contraventions of Road Traffic Regulations are not dealt with through the courts as criminal offences, but handled by an administrative procedure and classified as 'regulatory offences'. This reflects a policy of decriminalizing petty offences and enabled the Government to argue that offences of the type committed by the applicant fell outside the scope of Article 6. The question for the Court was therefore not just Mr Öztürk's right to a free interpreter, but the effect of the German policy of decriminalization on the applicability of the Convention.

It would obviously be undesirable for States to be able to remove the guarantees set out in Article 6 by the simple expedient of reclassifying offences. So when presented with the issue of military discipline in 1976<sup>25</sup> the Court held that 'criminal charge' in Article 6 (1) and 'criminal offence' in Article 6 (3) are autonomous in the sense that though an offence may be classified as non-criminal in domestic law, it is for the Court to determine whether it falls within Article 6. In the present case the Court reaffirmed the concept of autonomy and devoted the bulk of its judgment to the problem of classifying the German law in accordance with the criteria laid down in the earlier case.

Holding that 'the first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law',<sup>26</sup> the Court found that under German law the facts alleged against the applicant amounted to a regulatory offence which was not part of the criminal law. However, the Court noted that much of the law governing criminal procedure applies by analogy to regulatory proceedings, and there is no 'absolute partition' separating criminal law from the law of regulatory offences.

The second criterion, 'the very nature of the offence, considered also in relation to the nature of the corresponding penalty',<sup>27</sup> carried greater weight. Here the Court acknowledged that the legislation creating regulatory offences represented an important reform in German criminal law and involved more than a simple change of terminology. It pointed out, however, that in ordinary usage a 'criminal offence' would normally be taken to be one carrying penalties in the form of fines or deprivation of liberty and intended to be a deterrent. Furthermore, the majority of parties to the Convention would still classify the applicant's conduct as criminal. There had been changes in German law as a result of the policy of decriminalization, but these related essentially to procedural matters and to the

<sup>25</sup> See *Engel and others*, Series A, No. 22, and this *Year Book*, 48 (1976-7), p. 386.

<sup>26</sup> Judgment, para. 50.

<sup>27</sup> *Ibid.*, para. 52.

range of available sanctions. The latter, moreover, retained their punitive character, while the substance of the rule had undergone no change at all. The offence was minor, but this was irrelevant because there is 'nothing to suggest that the criminal offence referred to in the Convention necessarily implies a certain degree of seriousness',<sup>28</sup> and to permit States to remove a whole category of offences on the ground that they were petty would be contrary to the object and purpose of Article 6.

Concluding that 'the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature',<sup>29</sup> the Court held that a third criterion, 'the nature and degree of severity of the penalty',<sup>30</sup> need not be examined, since the relative lack of seriousness of the penalty could not divest the offence of its inherently criminal character.

The Court therefore concluded that Article 6 (3) (e) was applicable<sup>31</sup> and in the light of the facts found there had been a violation in the present case. Its decision on just satisfaction under Article 50 was reserved and, as Case No. 16, is described below.

The Court decided that Article 6 (3) (e) was applicable by a majority of 13 votes to 5 and that it had been violated by 12 votes to 6. For the five judges<sup>32</sup> who delivered dissenting opinions on the question of applicability, the Court underestimated the significance of decriminalization and was too ready to assimilate regulatory offences and conventional crime. Although this is only the second case in which the Court has been concerned with the right to an interpreter,<sup>33</sup> the significance of *Öztürk* clearly lies in these wider issues of approach and policy.

In one form or another decriminalization is already the policy of several members of the Council of Europe and the process seems likely to continue. As the Court emphasized, the effect of its judgment is not to challenge this policy, but to ensure that when the prosecution and punishment of minor offences is transferred to administrative authorities, there is an ultimate right of recourse to a tribunal which can provide the guarantees of Article 6. However, the source of the difficulty in cases of this kind, as Judge Matscher pointed out, is that 'the individual undoubtedly needs certain procedural guarantees, but not necessarily all those for which Article 6 provides . . .'.<sup>34</sup> So the problem here is really 'rooted in the incomplete and defective nature of the procedural guarantees included in the Convention'.<sup>35</sup> Like the controversy over 'civil rights and obligations' in Article 6 (1), which is essentially similar,<sup>36</sup> it is therefore likely to be with us for some time to come.

<sup>28</sup> Ibid., para. 53.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid. para. 50.

<sup>31</sup> The Court also dismissed an argument by the Government that the applicant did not have the status of a person 'charged with a criminal offence', citing in this connection its previous jurisprudence on Article 6 (1).

<sup>32</sup> The five members of the Court who delivered dissenting opinions on this point were Judges Thór Vilhjálmsson, Bindschedler-Robert, Liesch, Matscher and Bernhardt. In addition, Judge Pinheiro Farinha delivered a brief opinion explaining why he considered there had been no breach of Article 6 (3) (e) on the facts.

<sup>33</sup> The first case was *Luedicke, Belkacem and Koç*, Series A, No. 29. See this *Year Book*, 49 (1978), p. 315. It should also be noted that in the *Temeltasch* case in 1983 the Committee of Ministers followed the Commission in upholding a Swiss reservation to Article 6 (3) (e). See Imbert, *International and Comparative Law Quarterly*, 33 (1984), p. 558.

<sup>34</sup> Judge Matscher, dissenting opinion, para. C 2.

<sup>35</sup> Ibid.

<sup>36</sup> See, for example, *Albert and Le Compte*, Series A, No. 58, and this *Year Book*, 54 (1983), p. 319.

*Right to a public hearing (Article 6 (1))—right to a judgment pronounced publicly (Article 6 (1))*

*Case No. 5. Sutter case.*<sup>37</sup> The Court held unanimously that the absence of public hearings before the Swiss Military Court of Cassation had not violated Article 6 (1) of the Convention, and by 11 votes to 4 that the absence of a public pronouncement of a judgment of that Court had not contravened the same article.

The facts in this case were simple. The applicant, a Swiss student, underwent refresher training in 1976. In the following year, after a public hearing, a Divisional Court sentenced him to ten days' imprisonment for repeated insubordination and for breaking the service regulations on haircuts. The judgment was pronounced publicly and a copy sent to the applicant. Mr Sutter then appealed on points of law to the Military Court of Cassation, which used a written procedure and dismissed the appeal. The judgment was delivered in the parties' absence and communicated to the applicant in writing three months later.

In his application to the Commission Mr Sutter complained *inter alia* that the absence of public hearings in the cassation proceedings and the lack of a public pronouncement of the judgment violated Article 6 (1). In its report of October 1981 the Commission, by a narrow majority, expressed the opinion that the Convention had not been violated. The Commission and the Government then referred the case to the Court.

The Court described the purpose of the requirement of publicity as set out in its earlier jurisprudence, then turned to the particular facts. On the question of public hearings, it pointed out that Mr Sutter's case had been heard in public by the Divisional Court and that the Court of Cassation had been solely concerned with the interpretation of the law. The latter had received a memorial from the applicant and a simple prosecution request that the appeal be dismissed. It could not be said that the trial had been unfair at any stage. In the particular circumstances oral argument during a public hearing before the Court of Cassation would not have provided any further guarantee of the fundamental principles underlying Article 6. There had therefore been no breach of the Convention.

The claim that the judgment of the Military Court of Cassation had not been publicly pronounced was also unsuccessful. The Court explained that anyone who can establish an interest may consult or obtain a copy of the full text of judgments of the Military Court and that its most important judgments, such as that in Mr Sutter's case, are subsequently published in an official collection. Having regard to the issues dealt with by the Military Court and to its decision, which did nothing more than make the judgment of the Divisional Court final, a literal interpretation of Article 6 (1) would be rigid and inappropriate. There had therefore been no breach in the present case.

Four members of the Court dissented on the second issue. In their view the Court had attached too little importance to the accessibility of judgments. Holding that 'Public knowledge of court decisions cannot be secured by confining that knowledge to a limited class of persons'<sup>38</sup> they expressed dissatisfaction with both the restricted access to judgments and a somewhat haphazard system of

<sup>37</sup> ECHR, judgment of 22 February 1984, Series A, No. 74. French text authentic. The case was decided by the plenary Court.

<sup>38</sup> Dissenting opinion of Judges Cremona, Ganshof van der Meersch, Walsh and Macdonald.

publication. Swiss law now requires the Military Court of Cassation to deliver its judgments in open court. However, the publicity to be given to judgments elsewhere will doubtless be an issue in future cases.

Like *Pretto* (Case No. 2) and *Axen* (Case No. 3), the present case raises the general question of how the publicity requirements of the Convention apply to proceedings in cassation. The Court's emphasis on 'the particular circumstances of the case' and 'the special features of the proceedings' suggests that such proceedings are fully subject to Article 6 (1). Three members of the Court challenged this view<sup>39</sup> and maintained that if the only question is whether the lower court has correctly interpreted the law, the requirement of publicity can be given a restrictive interpretation. However, one member of the Court has consistently expressed the opposite opinion<sup>40</sup> which also seems implicit in the dissenting judgment. This is therefore another matter for future clarification.

*Right to liberty (Article 5 (1))—application to person of unsound mind—right to have the lawfulness of detention decided 'speedily' (Article 5 (4))—just satisfaction (Article 50)*

*Case No. 6. Luberti case.*<sup>41</sup> The Court held unanimously that the applicant's confinement in a psychiatric hospital in Italy had not contravened Article 5 (1) of the Convention, but that there had been a violation of Article 5 (4) when the Italian courts had failed to deal 'speedily' with his applications for release. The applicant was awarded 1 million lire, together with any value added tax that might be due, in respect of costs and expenses.

In 1970 the applicant, an Italian, shot and killed his mistress and in 1976 was convicted of murder. In 1979 an appeal against this conviction was allowed on the ground of mental incapacity and the court ordered him to be detained for two years in a psychiatric hospital. Immediately after this decision Mr Luberti submitted an application for his release. That application and a subsequent attempt were without result, but a third application was successful and in June 1981 he was released. In his application to the Commission Mr Luberti claimed that his detention was unjustified and constituted a breach of Article 5 (1) and that because his case had not been dealt with speedily there had been a breach of Article 5 (4). In its report of May 1982 the Commission supported the second claim, but not the first, and then referred the case to the Court.

Article 5 (1) of the Convention provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law;

...

(e) the lawful detention . . . of persons of unsound mind . . .

The first question was whether at the time of the appeal court's decision in 1979 Mr Luberti was properly regarded as a 'person of unsound mind'. The Court

<sup>39</sup> Concurring opinion of Judge Bernhardt, joined by Judges Bindschedler-Robert and Matscher.

<sup>40</sup> Judge Ganshof van der Meersch delivered short concurring opinions on this point in *Pretto* and in *Axen*, and made supplementary observations to the same effect in support of his dissenting opinion in *Sutter*.

<sup>41</sup> ECHR, judgment of 23 February 1984, Series A, No. 75. French text authentic. The Court consisted of the following Chamber of Judges: Wiarda (President); Cremona, Lagergren, García de Enterría, Sir Vincent Evans, Russo, Bernhardt (Judges).

explained that the national authorities must be granted a margin of appreciation in deciding this point and that the questions for the Court were whether the person had been reliably shown to be of unsound mind and whether the mental disorder was of a kind or degree warranting compulsory confinement. In Mr Luberti's case the Court was in no doubt that both conditions were satisfied. The appeal court had based itself on psychiatric reports relating both to the applicant's past and present mental state and these indicated that he was dangerous enough to need confinement.

Having decided that the initial detention was compatible with Article 5 (1), the Court next had to decide whether the applicant's confinement had continued beyond the period justified by his mental disorder. A report in March 1980 concluded that he had recovered and should be released. However, this emanated from a psychologist whom the applicant had consulted privately and, not surprisingly, was held by the Court to be an inadequate justification for his release. In August 1980 Mr Luberti absconded and no further psychiatric examination was possible until his arrest in March 1981. The report which was then made recommended his release, which followed in June. There was thus only a short delay after the submission of the second report and this the Court held was justified by the authorities' need to be satisfied that someone who had committed homicide could safely be readmitted to the community. At no stage, therefore, had there been any breach of Article 5 (1).

Article 5 (4) of the Convention provides:

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

The only question here was whether the Italian courts had given a decision 'speedily' on Mr Luberti's applications for the termination of his confinement. The first application was made to the Rome Supervision Division and concluded eighteen months later with a finding of lack of jurisdiction. This delay had various causes, some of which were not the responsibility of the authorities. However, the Government conceded that the proceedings had not been concluded speedily and the Court, stressing that this was 'an urgent case involving deprivation of liberty',<sup>42</sup> agreed.

No such criticism could be made of the handling of the two subsequent applications. Mr Luberti's application to the Rome Appeal Court of Assize in August 1980 was naturally suspended when the applicant rendered psychiatric examination impossible by absconding, and the last, and ultimately successful, application to the Naples Supervision Division was delayed in the same way. Bearing in mind that the applicant's multiple applications were a further cause of delay, the Court was satisfied that the period of almost ten months taken up by the proceedings in Naples was not excessive.

Thus only one of the three sets of proceedings instituted by Mr Luberti had been characterized by inordinate delay. However, the Court in its overall assessment of the situation concluded that the failure of the Rome Supervision Division to deal with the applicant's case expeditiously was enough to violate Article 5 (4).

<sup>42</sup> Judgment, para. 34.

There remained the question of just satisfaction under Article 50, which the Court found was ready for decision. Mr Luberti's claim for a large sum by way of compensation for pecuniary and non-pecuniary loss was disallowed because he was unable to show that he would have been released at an earlier date if Article 5 (4) had been complied with, while any non-pecuniary loss occasioned by the length of proceedings was partly attributable to his own conduct and held to be adequately compensated for by the judgment. The Court's award was therefore limited to the applicant's costs and expenses in respect of his first application for release, as to which the Government raised no objection.

In finding that Article 5 (4) had been violated though Article 5 (1) had not, the Court was following previous decisions in which the independence of the two provisions has been emphasized.<sup>43</sup> Likewise, in its treatment of the conditions under which mental patients may be detained and the procedural guarantees of the Convention, it was treading a familiar path.<sup>44</sup> This is, however, the first case in which the requirement of a 'speedy' decision has been in issue, and may be compared with Case No. 8, where a similar point was considered.

*The right of defence in criminal cases (Article 6 (3) (c))—just satisfaction (Article 50)*

*Case No. 7. Goddi case.*<sup>45</sup> The Court held unanimously that Italy had infringed Article 6 (3) (c) of the Convention when the Bologna Court of Appeal dealt with a case involving the applicant in a manner which denied him the benefit of a practical and effective defence. The respondent State was ordered to pay the applicant 5 million lire by way of satisfaction.

The applicant, a shepherd, was convicted by an Italian court of various criminal offences, fined and sentenced to eighteen months' imprisonment. The prosecutor and the applicant both appealed and after several adjournments the Bologna Court of Appeal increased the sentence. The hearing of the appeal took place without the applicant who, unknown to the court, had been arrested for other offences and imprisoned elsewhere, and without the applicant's counsel because notice of the hearing had been sent to a lawyer who was no longer acting for him. When Mr Goddi's attempt to challenge the appeal proceedings in the Court of Cassation was unsuccessful, he lodged an application with the Commission. In its report of July 1982 the latter expressed the unanimous opinion that there had been a violation of Article 6 (3) (c). The Commission then referred the case to the Court.

Article 6 (3) (c) of the Convention provides:

Everyone charged with a criminal offence has the following minimum rights:

...

(c) to defend himself in person or through legal assistance of his own choosing . . .

There was no doubt that on the facts the applicant did not have the benefit of the 'practical and effective defence' which the Court has held that this provision

<sup>43</sup> See, e.g., the *Van Droogenbroeck* case, Series A, No. 50, and this *Year Book*, 53 (1982), p. 314.

<sup>44</sup> See the *Winterwerp* case, Series A, No. 33, and this *Year Book*, 50 (1979), p. 267, and *X v. United Kingdom*, Series A, No. 46, and this *Year Book*, 52 (1981), p. 347. For a review of the position of mental patients under the Convention, see Muchlinski, *Human Rights Review*, 5 (1980), p. 90.

<sup>45</sup> ECHR, judgment of 9 April 1984, Series A, No. 76. This case was decided under the revised Rules of Court, which provide that 'unless the Court decides otherwise, both texts shall be authentic' (Rule 27 (5)). The Court consisted of the following Chamber of Judges: Wiarda (President); Lagergren, Liesch, Gölcüklü, Walsh, Russo, Gersing (Judges).

requires. The question, however, was whether the situation in which Mr Goddi found himself was attributable to Italy.

With regard to the applicant's absence from the hearing in the Court of Appeal, the European Court decided that the public prosecutor's office had taken the necessary steps to serve the summons on the applicant and that there was insufficient evidence to blame the prison authorities for his non-appearance.

As regards the absence of Mr Goddi's lawyer, the Court was satisfied that the judicial authorities ought to have realized that only his new lawyer could provide the applicant with an effective defence and should therefore have ensured that he was notified.

At the hearing in the Court of Appeal the applicant was represented by an officially appointed lawyer who was unfamiliar with his case. The Government argued that even if this meant that Mr Goddi lacked an effective defence, the State was not responsible because the court could not supervise the way in which counsel carried out his duties. The European Court did not agree. Pointing out that its duty was 'to determine whether the Bologna Court of Appeal took steps to ensure that the accused had the benefit of a fair trial, including the opportunity for an effective defence',<sup>46</sup> it held that the Italian court could have adjourned the hearing (as the public prosecutor's office had requested), or directed that the hearing be suspended to give counsel an opportunity to study the case file, prepare his pleadings and, if necessary, consult his client. The failure to do this, together with the failure to notify Mr Goddi's lawyer, meant that at the hearing in the Court of Appeal there had been a violation of Article 6 (3) (c).

The Court found that the question of just satisfaction under Article 50 was ready for decision and held that the applicant was entitled to compensation for loss of the opportunity to present an effective defence and for non-pecuniary damage. However, the 20 million lire claimed by Mr Goddi was reduced by the Court to 5 million lire in view of the speculative element in the assessment.

The need for an accused to be provided with effective representation was established in the *Artico* case<sup>47</sup> and the present case is an excellent illustration of the principle. By a happy coincidence this was also the first case to be decided under the new Rules of the Court,<sup>48</sup> with the result that the applicant not only won his case, but was also able to participate in the Court's proceedings.

*Meaning of 'officer authorized by law to exercise judicial power' (Article 5 (3))—right to liberty (Article 5 (1))—freedom from discrimination (Article 14)—right to have the lawfulness of detention decided 'speedily' (Article 5 (4))—domestic remedies (Article 26)—meaning of 'victim' (Article 25)—just satisfaction (Article 50)*

*Cases Nos. 8, 9 and 10. de Jong, Baljet and van den Brink case;*<sup>49</sup> *van der Sluijs,*

<sup>46</sup> Judgment, para. 31.

<sup>47</sup> ECHR, judgment of 13 May 1980, Series A, No. 37. See this *Year Book*, 51 (1980), p. 332.

<sup>48</sup> See Rule 30. The Commission referred the case to the Court on 6 January 1983, five days after the revised Rules of Court entered into force. For discussion of this and other aspects of the revised Rules, see Mahoney, *Yearbook of European Law*, 3 (1983), p. 127.

<sup>49</sup> ECHR, judgment of 22 May 1984, Series A, No. 77. The Court consisted of the following Chamber of Judges: Ryssdal (President); Wiarda, Cremona, Bindschedler-Robert, Gölcüklü, Pettiti, Walsh (Judges).

*Zuiderveld and Klapp* case;<sup>50</sup> *Duinhof and Duijf* case.<sup>51</sup> In each of these judgments the Court held unanimously that the Netherlands had violated Article 5 (3) of the Convention because, following their arrest under military law, the applicants had not been brought promptly before a judge or other officer authorized by law to exercise judicial power. As regards additional complaints made by the applicants in the first case, the Court held that there had also been a breach of Article 5 (4), but no breach of other articles. Each applicant was awarded 300 Dutch guilders by way of just satisfaction under Article 50.

These cases originated in applications lodged with the Commission between August 1979 and February 1982. The eight applicants had been conscripted into the Netherlands armed forces and had refused to obey particular orders on account of their beliefs as conscientious objectors. Following their arrest for insubordination they were referred for trial before the military court, having with one exception appeared before the *auditeur-militair* within a few days of their arrest. Two of the applicants were released from detention and subsequently recognized as conscientious objectors. The others were detained on remand, and appeared before the *officier-commissaris* and in one case also before the *auditeur-militair*. Later they were brought before the Military Court, where all save one were convicted and sentenced to terms of imprisonment. In its reports of October 1982 and July 1983 the Commission found that this procedure had involved a breach of Article 5 (3) and also upheld a complaint by de Jong, Baljet and van den Brink concerning the procedure for challenging their detention. The Commission then referred the three cases to the Court.<sup>52</sup>

Article 5 (1) (c) of the Convention permits 'the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence . . .', and Article 5 (3) provides:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power . . .

The first issue in these cases was whether the *auditeur-militair*, whose function at the preliminary stage is to perform an investigatory and advisory role, could be regarded as an 'officer authorized by law to exercise judicial power' for the purposes of this article.

In its judgment in the *Schiesser* case<sup>53</sup> the Court decided that to fall within this provision an official must enjoy 'independence of the executive and of the parties'; he must personally hear the individual brought before him; he must have the power of 'reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons for justifying detention and of ordering release if there are none', and he must actually exercise that power.

In the present cases the Court decided that in the initial proceedings the above requirements were not fulfilled because in Dutch law the *auditeur-militair* had no

<sup>50</sup> ECHR, judgment of 22 May 1984, Series A, No. 78. This case was decided by the Chamber constituted to hear the case of *de Jong, Baljet and van den Brink* (Case No. 8, above).

<sup>51</sup> ECHR, judgment of 22 May 1984, Series A, No. 79. This case was decided by the Chamber which heard Cases Nos. 8 and 9.

<sup>52</sup> The *Duinhof and Duijf* case was also referred to the Court by the Government.

<sup>53</sup> ECHR, judgment of 4 December 1979, Series A, No. 34. See this *Year Book*, 50 (1979), p. 270.

power to order the applicants' release. Evidence that it was the practice for the *auditeur-militair* to advise on the issue of detention, and for that advice to be invariably followed, did not impress the Court. Explaining that 'formal visible requirements stated in the "law" are especially important for the identification of the judicial authority empowered to decide on the liberty of the individual in view of the confidence which that authority must inspire in the public in a democratic society',<sup>54</sup> the Court held that a purely internal practice with no binding force, and which could at any moment be departed from, was not sufficient to constitute authority given by 'law' to exercise the judicial power contemplated by Article 5 (3).

Another deficiency was the *auditeur-militair's* lack of independence. Under Dutch law he not only undertook preliminary investigations, but could also be called upon to act as the prosecuting authority in cases which might include those in which he had earlier advised on the issue of detention. In the Court's view this meant that he could not be said to be independent of the parties, as Article 5 (3) required.<sup>55</sup>

The next question was whether the requirements of the Convention could be satisfied by the hearing before the *officier-commissaris*.<sup>56</sup> Like the *auditeur-militair*, this official has an investigatory function and, according to the Government, can be instrumental in securing the release of a detainee by addressing a request to the military court. Again, however, the *officier-commissaris* has no power to order a release and on this ground was held by the Court to fall outside Article 5 (3).

The final question concerned the hearing before the military court.<sup>57</sup> The problem here was that periods of from eight to fourteen days had elapsed before the court had held hearings on the issue of detention in the applicants' cases, whereas the Convention requires the individual to be brought 'promptly' before a judge or other suitable official. While the Court was prepared to recognize that this requirement must be interpreted according to the special features of each case, it decided that the delays which had occurred here were 'far in excess' of those permitted by the Convention notwithstanding 'the exigencies of military life and military justice'.<sup>58</sup>

In addition to Article 5 (3), the applicants de Jong, Baljet and van den Brink made a number of claims under other articles of the Convention. With reference to Article 5 (1) (c), which has been quoted earlier, they argued that according to the Military Code the justification for their detention was the need to maintain discipline amongst servicemen and that this represented a preventive policy unrelated both to their offence and to the circumstances in which detention is justifiable under the Convention. This claim was rejected by the Court on the

<sup>54</sup> *de Jong, Baljet and van den Brink*, judgment, para. 48.

<sup>55</sup> This point was important to the Court's treatment of the one applicant whose case was heard after the referral for trial. At that stage the *auditeur-militair* was empowered to order release. However, the Court decided that his lack of independence meant that the hearing still failed to satisfy Article 5 (3). See *Duinhof and Duijf* judgment, para. 38.

<sup>56</sup> In the case of the two applicants who were released and whose cases were not heard by the *officier-commissaris* the Court refused to accept that they had been released promptly and before any judicial control of their detention was feasible. See *de Jong, Baljet and van den Brink*, judgment, para. 52.

<sup>57</sup> The Court had earlier made the point that the referral of the applicants' cases for trial provided them with access to a judicial authority, but was not in itself enough to satisfy Article 5 (3) since the judge or judicial officer must actually hear the detained person and take the appropriate decision.

<sup>58</sup> *Duinhof and Duijf* judgment, para. 41. In these circumstances the Court held that allegations by these applicants that the Court lacked independence did not require examination.

ground that the Military Code merely set out an additional condition to be satisfied in Netherlands law and in no way justified detention which was otherwise incompatible with the Convention.

A claim that there had been a violation of Article 14 taken in conjunction with Article 5 was also rejected. Article 14 provides that the enjoyment of the rights and freedoms of the Convention shall be secured without discrimination. The applicants claimed that a delay in staying the criminal proceedings against them, pending their claim to be recognized as conscientious objectors, was not in accordance with the usual practice. The Court doubted whether the alleged discrimination related to a right recognized by the Convention, but added that even if the complaint could be sufficiently related to Article 5, the applicants' treatment was prompted by the impending special mission of their battalion to the Lebanon as part of a United Nations unit. In these circumstances the Court considered that if discriminatory treatment had occurred, it was supported by an objective and reasonable justification.

Only one other claim calls for discussion. This was a claim under Article 5 (4) which, it will be recalled from *Luberti* (Case No. 6), entitles the individual to take proceedings by which the lawfulness of detention can be decided speedily. Two remedies were open to the applicants in the present case. The first remedy, a petition to the Military Court, was available during the period prior to referral for trial, but could not be exercised until an individual had been under arrest for fourteen days. Not surprisingly, the Court held that this remedy did not provide the applicants with the possibility of obtaining a 'speedy' decision on the lawfulness of their detention.

The second remedy was a request for release to the Military Court. The difficulty here was that this remedy became available only when a case had been referred for trial. Therefore although the Court was satisfied that the Military Court was capable of providing a speedy decision once a request was made, if there was delay in referring a case for trial, the individual would already have been denied his 'speedy' remedy.<sup>59</sup> The applicants in the present case had been referred for trial after spending between six and eleven days in custody. This, the Court said, was too long. In the circumstances therefore a speedy remedy to test the lawfulness of detention had not been available and there had been a breach of Article 5 (4).

In the first two cases the Court had to consider a number of preliminary objections raised by the Government. Pleas that several of the applicants had failed to exhaust their domestic remedies were rejected because the Government raised the point too late and so was estopped; or because the remedies concerned were uncertain or inadequate. The Government also argued that three of the applicants could not be regarded as 'victims' of a breach of the Convention, as required by Article 25, because time spent in remand had been deducted in its entirety from their sentences. This too was rejected. The existence of a violation does not depend on proof of detriment. Consequently, the mitigation of the applicants' sentences could only be relevant if it had been based on an acknowledgement that the Convention had been violated, which was not the case here.

The last issue was the question of just satisfaction under Article 50. Here the Court held that although the applicants had been unable to show that they would

<sup>59</sup> An argument by the Government to the effect that Articles 5 (3) and 5 (4) do not run concurrently would have avoided this conclusion, but was rejected.

probably have been released from custody on remand if they had received the benefit of Article 5 (3), they had suffered non-material prejudice calling for some compensation. Although the applicants' circumstances were not absolutely identical, the Court held that in view of the modest nature of the claims made, each applicant should receive a sum of 300 Dutch guilders by way of satisfaction.

Despite appearances these were not cases about conscientious objection. The law of the Netherlands makes ample provision for those who do not wish to perform military service and the applicants' clash with the military authorities was entirely attributable to their failure to use the facilities available. Similarly, the fact that on both the occasions on which the Court has considered the issue of military discipline the Netherlands Government has been the respondent<sup>60</sup> says less perhaps about domestic law than about the obtuseness of Dutch conscripts. Article 5 (3) is a much discussed provision, though these are the first cases in which it has been applied in a military context. For other claims involving the right to liberty and security of person in the period under review, see Cases No. 6, 14 and 19.

*Meaning of 'criminal charge' in Article 6 (1)—right to a 'fair' and 'public' hearing by an 'independent' and 'impartial' tribunal and to a judgment pronounced 'publicly' (Article 6 (1))—right of access to the courts (Article 6 (1))—right of defence (Articles 6 (3) (b) and (c))—right to respect for correspondence (Article 8)—right to an effective remedy before a national authority (Article 13)—domestic remedies (Article 26)—just satisfaction (Article 50)*

*Case No. 11. Campbell and Fell case.*<sup>61</sup> The Court held unanimously that in restricting the applicants' access to legal advice whilst they were in prison the United Kingdom had violated Articles 6 (1) and 8 of the Convention. As regards the first applicant, the Court held by majorities of 5 votes to 2 that disciplinary proceedings before the Board of Visitors involved a further breach of Article 6 (1) because the Board did not make its decision public, and a breach of the applicant's right of defence under Articles 6 (3) (b) and (c). As regards the second applicant, the Court decided unanimously that the restriction on his personal correspondence involved a violation of Article 8, and that in the absence of an effective remedy here and in respect of his access to legal advice, there had also been a breach of Article 13. The United Kingdom was ordered to pay the applicants £13,000 in respect of their legal costs and expenses.

The applicants were involved in an incident at Albany prison while serving long sentences as 'category A' prisoners for offences connected with the terrorist activities of the IRA. In the incident prison officers intervened to end a protest and both applicants sustained injuries. The prison Board of Visitors subsequently found them guilty of disciplinary offences and imposed penalties including loss of remission. Each applicant sought to contact a lawyer with a view to instituting civil proceedings, but in accordance with the 'prior ventilation' rule, then in force, was prevented from doing so until an internal investigation had been made.

In their applications to the Commission in 1977 Mr Campbell and Father Fell complained of various breaches of Articles 6 and 8 of the Convention and Father

<sup>60</sup> See *Engel and others*, Series A, No. 22, and this *Year Book*, 48 (1976-7), p. 386.

<sup>61</sup> ECHR, judgment of 28 June 1984, Series A, No. 80. English text authentic. The Court consisted of the following Chamber of Judges: Wiarda (President); Cremona, Thór Vilhjálmsson, Gölcüklü, Sir Vincent Evans, Macdonald, Russo (Judges).

Fell also invoked Article 13. In its report of May 1982 the Commission upheld several of these complaints and referred the case to the Court. In its final submissions the Government challenged a number of the Commission's findings and also invited the Court to take account of the changes in law and practice introduced as a response to earlier proceedings at Strasbourg.

Before dealing with the merits the Court considered two preliminary points. As regards Mr Campbell, the Government submitted that by failing to apply for judicial review of the Board of Visitors' adjudication the applicant had failed to exhaust domestic remedies as required by Article 26. This plea was rejected on the merits. Father Fell, on the other hand, whose complaints regarding the Board of Visitors' adjudication had been declared inadmissible by the Commission under Article 26, sought to reopen the question before the Court, but this submission also was rejected.

The most important substantive issue in the case was Mr Campbell's claim that the proceedings before the Board of Visitors had violated Article 6 (1), which reads as follows:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

The first question was whether the adjudication by the Board of Visitors could be said to involve the determination of a 'criminal charge'. The Commission came to the conclusion that it could and that Article 6 (1) was therefore applicable. In their principal submission the Government denied this. To resolve this issue the Court applied the criteria laid down in the case of *Engel and others*<sup>62</sup> and recently reaffirmed in *Öztürk* (Case No. 4). In those cases, it will be recalled, the Court held that the concept of a criminal charge is an autonomous one and that the key issues are the classification of the offence in domestic law, the nature of the offence and the nature and severity of the penalty.

In the present case it was clear that the offences with which the applicant was charged, namely mutiny and doing gross personal violence to an officer, are classified by English law as disciplinary offences. It was also clear, however, that the offences in question are serious and of a type which can form the basis of criminal proceedings. These considerations gave the offences a certain criminal colouring and the Court held that this was confirmed by the decisive factor in the case, the penalty to which an offender is liable.

The applicant lost 570 days' remission as a result of his offences and could indeed have suffered the loss of all his remission (which amounted to almost three years) as well as other penalties. Remission is, of course, a privilege, not a right, but the Court held that this was irrelevant for present purposes because:

... the forfeiture of remission which Mr Campbell risked incurring and the forfeiture actually awarded involved such serious consequences as regards the length of his detention that these penalties have to be regarded, for Convention purposes, as 'criminal'. By causing

<sup>62</sup> ECHR, judgment of 8 June 1976, Series A, No. 22. See this *Year Book*, 48 (1976-7), p. 386.

detention to continue for substantially longer than would otherwise have been the case, the sanction came close to, even if it did not technically constitute, deprivation of liberty and the object and purpose of the Convention require that the imposition of a measure of such gravity should be accompanied by the guarantees of Article 6 (1).<sup>63</sup>

Having decided that Article 6 was applicable, the Court next had to consider the various complaints regarding its non-observance.

On the question of whether the Board of Visitors could be regarded as an 'independent' tribunal, the Court noted that in previous decisions it has regarded as factors to be taken into consideration: the manner of appointment of the members of a tribunal and the duration of their term of office; the existence of guarantees against outside pressures and whether the body presents an appearance of independence. Although the members of Boards of Visitors are appointed by the Home Secretary, the Court held that they were not, for that reason, to be regarded as lacking in independence. Their term of office is short and is not guaranteed. In the circumstances, however, these too were not regarded as crucial.

A more substantial point was that Boards of Visitors are required to exercise both an adjudicatory and a supervisory role. Since the latter necessarily involves close contact between the members of the Board, prison officials and the executive, it could be argued that in the eyes of the inmates the Board might be thought to lack independence. According to the Court, however, the question was whether this view was one that prisoners were 'reasonably entitled' to take. Holding that the contacts alone were not sufficient to justify such an impression, the Court decided that not even the need for 'justice to be seen to be done' was a reason for holding that the Board lacked independence for the purposes of the Convention.

If the Board of Visitors was 'independent' could it be regarded as 'impartial'? The personal impartiality of the members of the Board had not been challenged and so, as with the issue of independence, the matter was one of appearances. The Board played no role in the disciplinary proceedings against the applicant until the hearing. There was therefore nothing in the organization of the adjudication to reflect adversely on its impartiality. Although the applicant might have thought the Board biased, for reasons similar to those given on the independence issue, the Court held that this was not sufficient to contravene Article 6.

The adjudication by the Board of Visitors was not conducted in public. The Commission considered that this was not in conformity with the Convention, but the Government, referring to the qualifications to be found in Article 6 (1), disagreed. The Court agreed with the Government. Observing that public order and security both carry more weight in relation to prison disciplinary proceedings than in ordinary criminal proceedings, it held that to require such proceedings to be held in public would impose a disproportionate burden on the authorities.

The Government maintained that the same factors were relevant to the last aspect of Article 6 (1), the requirement that the decision be pronounced publicly. Here, however, the Court agreed with the Commission. Recalling that the importance of this principle had recently been emphasized in *Sutter* (Case No. 5), the Court held that there is no implied limitation excluding the need

<sup>63</sup> Judgment, para. 72.

for publicity in relation to disciplinary adjudications. Consequently, in the absence of any steps to make the Board of Visitors' decision public, there had been a violation of Article 6 (1).

Only one other claim in respect of the proceedings before the Board of Visitors need be mentioned.<sup>64</sup> This was that the applicant had been denied 'adequate time and facilities for the preparation of his defence', contrary to Article 6 (3) (b), and had not had the benefit of legal assistance, as required by Article 6 (3) (c). Both submissions were upheld. Under the law in force at the time there was no right to legal assistance for disciplinary proceedings and as a matter of practice such requests were always denied. In these circumstances there had clearly been a violation of the applicant's right of defence under Article 6 (3) (c) and, according to the Court, under Article 6 (3) (b) also.

As well as the various claims in respect of the proceedings before the Board of Visitors, the Court was presented with a submission from both applicants that the delay in granting them permission to seek legal advice in connection with civil actions for compensation constituted a denial of access to the courts in violation of Article 6 (1) of the Convention, as interpreted in the judgment in the *Golder* case.<sup>65</sup> The Government's response was to point out that the 'prior ventilation' rule which had occasioned the delay had subsequently been replaced by a 'simultaneous ventilation' rule and to submit that in the light of this the Court should decline to rule on the matter. It will be recalled that a similar plea was made in 1983, when the identical point was raised in the *Silver* case.<sup>66</sup> It was rejected then and, not surprisingly, was rejected again here. In the case of Father Fell the Court held that there was a further violation of Article 6 (1) because after being given leave to contact his solicitors he was for two months refused permission to consult them out of hearing of a prison officer.

The effect of the prior ventilation rule was to prevent all correspondence between the applicants and their advisers concerning the proposed litigation until the internal inquiry was completed. This, as the Government conceded, not only involved Article 6 (1), but also constituted an interference with the applicants' right to respect for correspondence, as guaranteed by Article 8. In this respect there was again a parallel with the *Silver* case in which the Court ruled that prohibiting correspondence containing unventilated complaints about prison treatment could not be justified as a 'necessary' restriction under Article 8 (2). In the present case the facts were similar. The applicants' inability to correspond with their solicitors therefore also violated Article 8.

The last point under Article 8 was Father Fell's complaint of a restriction on his correspondence arising from the application of a rule prohibiting correspondence with persons other than relatives or existing friends. Like the prior ventilation rule this rule has now been changed, but at the time complained of had the effect of preventing the applicant from corresponding with two nuns of his acquaintance. In the *Silver* case the Court decided that, even as regards 'category A' prisoners, this rule could not be considered a 'necessary' restriction on correspondence in the absence of special considerations. Since no such considerations had been shown to exist in the present case, the restriction on Father Fell's correspondence involved a further violation of Article 8.

<sup>64</sup> Claims by the applicant in respect of Articles 6 (2), 6 (3) (a) and 6 (3) (d) were found to be unsubstantiated.

<sup>65</sup> ECHR, judgment of 21 February 1975, Series A, No. 18. See this *Year Book*, 47 (1973-4), p. 391.

<sup>66</sup> ECHR, judgment of 25 March 1983, Series A, No. 61. See this *Year Book*, 54 (1983), p. 326.

The final substantive point concerned Article 13, which reads as follows:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

The main question here was whether in relation to Father Fell's complaints under Article 8 there was an effective remedy in domestic law. The Government conceded that there was no such remedy available in respect of access to legal advice. On the refusal to permit correspondence with the nuns, however, the Government suggested that a petition to the Home Secretary might have been successful. The Court, in accordance with its judgment on a similar point in *Silver*, pointed out that where a complaint results from the application of norms that are incompatible with the Convention, such a petition cannot be effective. As regards the applicant's complaints in respect of both aspects of Article 8 there had accordingly been a violation of Article 13.

The only remaining issue was the question of just compensation under Article 50. Bearing in mind its finding that the disciplinary proceedings had not been unfair, the Court rejected Mr Campbell's claim that they were a nullity and rejected his claim for compensation in view of the fact that the violations had caused no prejudice. Since neither applicant was able to show that the delay in obtaining legal advice had been prejudicial, claims for compensation on this ground were also rejected. As regards the restrictions on Father Fell's correspondence, the Court took into account that extensive correspondence had in fact been permitted, while control of prisoners' correspondence in general has been relaxed since 1981, and decided that no compensation was called for.

On the question of costs and expenses the Court, in accordance with its previous jurisprudence, scrutinized the sums claimed to see whether they were reasonable as to quantum. It also took account of the fact that a substantial proportion of the applicants' claims were found to be inadmissible or rejected. The sum finally awarded under this head was, as a consequence, little more than half the original claim.

In the context of the jurisprudence of the Convention the importance of this case lies in the Court's readiness to be persuaded that prison disciplinary proceedings are sufficiently analogous to criminal trials to require the guarantees of Article 6. It is not surprising that here, as in *Öztürk*, the applicability of the Convention was the main issue to divide the Court.<sup>67</sup> For deciding where the line should be drawn is a difficult matter of policy. The various other issues in contrast were relatively straightforward, although it should be noted that on the issue of the publicity to be given to the proceedings there was again some disagreement.<sup>68</sup>

This is the third case in which the Court has been concerned with the issue of prisoners' rights in the United Kingdom. As a result of the decision in *Golder* and the proceedings in *Silver* considerable changes were made with the aim of bringing British practice into line with the Convention. These measures, rightly,

<sup>67</sup> The Court decided that Article 6 was applicable to the disciplinary proceedings against Mr Campbell by a majority of 4 votes to 3. The minority, Judges Thór Vilhjálmsson, Gölcüklü and Sir Vincent Evans, explained their position in dissenting opinions.

<sup>68</sup> The decision that there had been no breach of Article 6 (1) by reason of the fact that the Board of Visitors did not conduct its adjudication in public was also arrived at by a majority of 4 votes to 3. Here the minority were Judges Cremona, Macdonald and Russo, who delivered a brief joint dissenting opinion.

had little bearing on the outcome of *Campbell and Fell*. In future, however, there will clearly be less scope for complaints of this kind, an effect which will be strengthened if the English courts are prepared to take account of the Convention.<sup>69</sup>

*Trial within a reasonable time (Article 6 (1))—just satisfaction (Article 50)*

*Case No. 12. Guincho case.*<sup>70</sup> The Court held unanimously that Portugal had infringed Article 6 (1) of the Convention because the length of a civil action brought by the applicant to claim damages had exceeded a 'reasonable time'. The applicant was awarded 150,000 escudos by way of just satisfaction under Article 50.

In 1976 the applicant was the victim of a road accident in which he lost an eye. In December 1978 he instituted civil proceedings in Portugal before the Vila Franca de Xira Regional Court against the driver of the vehicle which had caused the accident, its owner and the 'Tranquilidade' Insurance Company. A writ was served in June 1978 on the defendants, who filed their pleadings within a month, but it was not until January 1981 that these were transmitted to the plaintiff. The trial took place in October 1982, when the Regional Court upheld the claim, but finding that the assessment of the damages was not yet ready for decision, reserved it for the proceedings relative to execution. These were initiated by the applicant in September 1983, but in March 1984, when the European Court heard Mr Guincho's case, had still not been completed.

In his application to the Commission in May 1980 Mr Guincho complained that the Regional Court's delays in dealing with his case had contravened Article 6 (1), the relevant portion of which provides:

In the determination of his civil rights and obligations . . . everyone is entitled to a . . . hearing within a reasonable time by a . . . tribunal . . .

In its report of March 1983, the Commission expressed the unanimous opinion that there had been a violation of this provision, and then, together with the Government, referred the case to the Court.

The time to be taken into account for Convention purposes ran from December 1978, when the action began, to October 1982, when the case was decided on the merits.<sup>71</sup> To decide whether this period of three years, ten months and eighteen days exceeded a reasonable time, the Court applied the criteria established in its previous case law, namely the complexity of the case, the conduct of the applicant and the conduct of the authorities. The case was no more complicated than normal proceedings of this kind and there was little the applicant could have done to expedite proceedings. Accordingly, the case turned on the conduct of the authorities.

<sup>69</sup> For recent attempts to invoke the Convention in relation to prisoners' rights, see *R v. Home Secretary, ex parte Tarrant*, [1984] 2 WLR 613, and *R v. Home Secretary, ex parte Anderson*, [1984] 2 WLR 725. For the position of the Convention in English law generally, see Duffy, *International and Comparative Law Quarterly*, 29 (1980), p. 585.

<sup>70</sup> ECHR, judgment of 10 July 1984, Series A, No. 81. The Court consisted of the following Chamber of Judges: Wiarda (President); Cremona, Ganshof van der Meersch, Gölcüklü, Pinheiro Farinha, García de Enterría, Golsong (Judges).

<sup>71</sup> Although the 1982 judgment was not the 'final decision' in the case, the subsequent proceedings for execution of the judgment depended on the applicant's initiative and were found by the Court to be not open to criticism.

In *Zimmerman and Steiner*<sup>72</sup> (1983) the Court held that a temporary backlog of business does not give rise to liability under the Convention, provided a State takes remedial action with the requisite promptness. It also decided, however, that where structural problems are allowed to develop and left unremedied, a State will not be allowed to plead the exigency of the situation. As regards the increase in the volume of litigation in the present case, the Court found Portugal to be in the second position. The authorities were on notice that a crisis had developed and had taken no effective steps to resolve it. Accordingly this was no answer to the applicant's claim.

As far as the restoration of democracy was concerned, the Court was prepared to recognize that this had caused difficulties with no equivalent in other Contracting States. It pointed out, however, that by ratifying the Convention Portugal had guaranteed to those within its jurisdiction the rights and freedoms defined in Section I, including trial within a reasonable time, something which, in the Court's words, is of 'extreme importance' for the proper administration of justice. As a result, the exceptional difficulties encountered in Portugal were not such as to deprive the applicant of his rights and there had been a breach of Article 6 (1).

As compensation under Article 50 Mr Guincho sought the interest he would have earned on the sum he was claiming as damages over a two-year period. The Court accepted that the applicant had been kept out of his interest for this time as a result of the unreasonable delay and even now was in a state of uncertainty. It therefore awarded him the sum of 150,000 escudos by way of satisfaction.

This is the latest of a number of cases in which a Government has sought to explain delays in the administration of justice by reference to unforeseen circumstances of one sort or another and the firm, though sympathetic, approach followed here is now well established in the Court's jurisprudence.<sup>73</sup> While cases of unreasonable delay are perhaps the most obvious consequence of the pressure on judicial resources, which is a widespread phenomenon, *Axen* (Case No. 3), *Öztürk* (Case No. 4) and *De Cubber* (Case No. 18) reflect its bearing on several other aspects of the Convention.

*Right to respect for private and family life and correspondence (Article 8)—application to the interception of postal and telephonic communications in the course of a criminal investigation—the meaning of 'in accordance with the law' and 'necessary in a democratic society' in Article 8 (2)*

*Case No. 13. Malone case.*<sup>74</sup> In this case, which concerned the laws and practices in England and Wales allowing interception of communications and 'metering' of telephones by or on behalf of the police, the Court held unanimously that there had been a violation of the applicant's right to respect for his private life and correspondence, as guaranteed by Article 8 of the Convention.

In 1977 the applicant, a British antique dealer, was charged with a number of offences relating to the dishonest handling of stolen goods. He was ultimately acquitted, but during his trial it emerged that a telephone conversation to which he was a party had been intercepted by the Post Office on behalf of the police, on

<sup>72</sup> ECHR, judgment of 13 July 1983, Series A, No. 66, and see this *Year Book*, 54 (1983), p. 339.

<sup>73</sup> In addition to *Zimmerman and Steiner* (above) see *Buchholz*, Series A, No. 42, this *Year Book*, 52 (1981), p. 335, and *Foti and others*, Series A, No. 56, this *Year Book*, 54 (1983), p. 314.

<sup>74</sup> ECHR, judgment of 2 August 1984, Series A, No. 82. The case was decided by the plenary Court.

the authority of a warrant issued by the Home Secretary. Mr Malone also believed that at the request of the police his correspondence had been intercepted, his telephone lines 'tapped' and his telephone 'metered' by a device recording all the numbers dialled. Beyond admitting the interception of the one conversation referred to at the trial, the Government neither admitted nor denied the allegations concerning correspondence and tapping and denied that concerning metering. They conceded, however, that as a suspected receiver of stolen goods, the applicant was one of a class of persons whose postal and telephone communications were liable to be intercepted.

After an unsuccessful attempt to pursue civil proceedings in England,<sup>75</sup> Mr Malone lodged an application with the Commission complaining of breaches of Articles 8 and 13 of the Convention. In its report of December 1982 the Commission expressed the opinion that there had been violations of both articles and then referred the case to the Court.

Article 8 of the Convention, which was the nub of the present case, provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others.

In the *Klass* case<sup>76</sup> in 1978 the Court held that the existence of a system for effecting secret surveillance of communications in itself amounts to an interference with the exercise of an applicant's rights under Article 8, apart from any measures actually taken against him. Thus in the present case, in which only a single interception was admitted, the fact that the applicant, as a suspected person, was liable to have his communications intercepted, meant that it was unnecessary for the Court to investigate the applicant's claims that his mail and telephone calls had been intercepted regularly.

Having established that there had been an interference with the right conferred by Article 8 (1), the Court turned to the main issue in the case, whether the interference could be justified under Article 8 (2). The guiding principles here were recently discussed by the Court in the *Silver* case,<sup>77</sup> where, in relation to the control of prisoners' correspondence, the Court decided that the expression 'in accordance with the law' means not only that any interference must have some basis in domestic law, but also that the law in question must be accessible and formulated with sufficient precision to enable the citizen to regulate his conduct.

The Court accepted the Government's contention that the requirements of the Convention cannot be exactly the same in a case of secret surveillance as when the restriction of individuals' conduct is in issue. 'In particular,' said the Court, 'the requirement of foreseeability cannot mean that an individual should be enabled to foresee when the authorities are likely to intercept his communications

<sup>75</sup> See *Malone v. Commissioner of Police of the Metropolis*, [1979] 2 WLR 700; also Bevan, *Public Law*, 1980, p. 431.

<sup>76</sup> ECHR, judgment of 6 September 1978, Series A, No. 28. See this *Year Book*, 49 (1978), p. 310.

<sup>77</sup> ECHR, judgment of 25 March 1983, Series A, No. 61. See this *Year Book*, 54 (1983), p. 326.

so that he can adapt his conduct accordingly.’<sup>78</sup> However, the law must still be both accessible and clear enough to provide an adequate indication of when and how this secret and potentially dangerous interference with civil liberty can be used.

Moreover, since the implementation of measures of surveillance is obviously not open to scrutiny, it would be contrary to the rule of law for the executive to be granted an unfettered discretionary power. Consequently, the scope and manner of exercise of any discretion cannot be left to administrative practice, but must be indicated in the law itself ‘with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual protection against arbitrary interference’.<sup>79</sup>

Judged by the above criteria, the Court found the law relating to the interception of communications in England and Wales to be conspicuously wanting. Interceptions were carried out on the authority of a warrant issued under the hand of a Secretary of State, usually the Home Secretary, and this power had been recognized as lawful. There was, however, disagreement between the Government, on the one hand, and the applicant and the Commission on the other, as to (a) whether such a warrant was essential for an interception to be lawful and (b) whether the Post Office Act 1969 imposed legal restraints on the Secretary of State’s powers.

The Court decided that it could not resolve this controversy without trespassing on the function of the English courts.<sup>80</sup> It was, however, unnecessary for it to do more than register that domestic law was obscure and open to differing interpretations. It could not be said with any certainty how far the power to intercept was regulated by legal rules and how far it was a matter of executive discretion. Agreeing, therefore, with the Commission, the Court concluded that:

the law of England and Wales does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.<sup>81</sup>

A second issue was whether the interferences which had been shown to exist could be said to be ‘necessary in a democratic society’ for a recognized purpose. In its judgment in the *Klass* case the Court recognized that some power to intercept communications is permissible to combat espionage and terrorism, but held that in order to be ‘necessary’ the power provided must be circumscribed and subject to controls. In the present case the Court accepted that similar powers may be justified under Article 8 (2) ‘for the prevention of disorder or crime’, but again made the point that safeguards against abuse are essential. The applicant maintained that the system in England and Wales did not satisfy this requirement. Having concluded, however, that the interferences in question were not ‘in accordance with the law’, the Court, with one dissentient,<sup>82</sup> held that it was unnecessary for it to examine this issue further.

The last question concerned ‘metering’, that is, the process whereby a record is maintained of the numbers dialled on a particular telephone and the time and

<sup>78</sup> Judgment, para. 67.

<sup>79</sup> *Ibid.*, para. 68.

<sup>80</sup> For details of this controversy, see paras. 69 to 79 of the judgment.

<sup>81</sup> Judgment, para. 79.

<sup>82</sup> In a well-argued separate opinion Judge Pettiti explained why he considered that this aspect of Article 8 (2) should have been examined.

duration of each call. This is a legitimate and even necessary part of the operation of a telephone service, and according to the Government was for that reason distinct from the interception of communications and outside the scope of Article 8. The Court disagreed. Deciding that the information obtained by metering—in particular the numbers dialled—is an integral part of telephone communication, the Court held that releasing such information to the police, without the subscriber's consent, must consequently be regarded as an interference with the exercise of a right guaranteed by Article 8.

The Government denied that metering had been used in relation to the applicant. However, here, as on the point considered earlier, the Court decided that it was sufficient that, as a suspected person, he was liable to be directly affected by the practice. From this it was a short step to decide that the situation in England and Wales constituted a breach of the Convention. It was not unlawful for the telephone service to comply with a request from the police to make and supply records of metering. However, there appeared to be no legal rules at all concerning the scope and manner of exercise of the discretion. As a consequence, the interference, though lawful in terms of domestic law, was not 'in accordance with the law' within the meaning of Article 8 (2) of the Convention.

The Court's conclusion was therefore that there had been a violation of Article 8 in the applicant's case as regards both interception of communications and release of records of metering to the police. In view of this decision the Court decided by a majority of 16 votes to 2<sup>83</sup> that it was unnecessary to examine the applicant's complaint under Article 13 (absence of an effective domestic remedy). The question of just satisfaction under Article 50 was reserved for later consideration.

This was the second of the two cases decided against the United Kingdom in the period under review. Unlike *Campbell and Fell* (Case No. 11), this was not a case of changing the law too late to forestall the proceedings, but one of intransigent attachment to practices manifestly inconsistent with the Convention. It has been clear since the *Klass* decision that reform is needed in this area and the Vice-Chancellor's observations in the Chancery Division in 1979 underlined the point.<sup>84</sup>

The Court explicitly limited its decision to interceptions effected by or on behalf of the police and within the general context of a criminal investigation. Despite this qualification, the Court's interpretation of Article 8 (2), in particular its treatment of the relation between laws and administrative practices, will plainly be relevant where other government services (such as HM Customs and Excise) or interceptions by the police for other purposes are concerned.

The decision on metering is particularly to be welcomed. Whereas the Commission decided that this was an issue on which it had insufficient information, the Court took the opportunity to make a logical inference from its earlier rulings on Article 8.<sup>85</sup> It should be noted in this connection that the Post Office Engineering Union was granted leave by the President of the Court to submit written

<sup>83</sup> Judges Matscher and Pinheiro Farinha delivered a brief dissenting opinion on this point.

<sup>84</sup> '... it is impossible to read the judgment in the *Klass* case without its becoming abundantly clear that a system which has no legal safeguards whatever has small chance of satisfying the requirements of that court, whatever administrative provisions there may be . . .; this is not a subject on which it is possible to feel any pride in English law': *per* Vice-Chancellor Megarry, [1979] 2 WLR 732. Legislation has been promised to implement the European Court's judgment. At the time of writing, however, no details of this were available.

<sup>85</sup> For a review of previous jurisprudence on the interpretation and application of Article 8, see Duffy, *Yearbook of European Law*, 2 (1982), p. 191.

comments on certain matters relating to the case. These were received at the registry shortly before the oral hearings in the case and appear to have been influential.<sup>86</sup> Intervention of this kind is provided for by Article 37 (2) of the new Rules of the Court, which was used for the first time in this case.

*Right of a person held in detention to be brought promptly before a judge or other judicial officer (Article 5 (3))—friendly settlement (Article 28 (b))*

*Case No. 14. Skoogström case.*<sup>87</sup> In this case, which concerned Sweden, the Court held by 4 votes to 3 that, having regard to the friendly settlement arrived at between the Government and the applicant, the case should be struck off its list.

The applicant owned a hotel in Sweden which went into liquidation in 1977. In the following year a warrant was issued for his arrest on various charges of fraud. He was arrested at his home on 5 May 1978, taken to the local police station, interrogated and interviewed by the district prosecutor. On 12 May the District Court decided that he should be remanded in custody. He was ultimately convicted and sentenced to eight months' imprisonment.

In its report the Commission expressed the unanimous opinion that the delay of seven days in bringing Mr Skoogström before 'a judge or other officer authorized by law to exercise judicial power' constituted a breach of Article 5 (3) of the Convention. In March 1984 the Court was notified of a friendly settlement between the Government and the applicant. The settlement provided for the introduction of legislation to amend the Code of Judicial Procedure, publication to the judiciary and prosecutors of a summary of the Commission's report and reimbursement of the applicant's costs.

In the light of the settlement the Government requested the Court to strike the case off its list. The applicant stated that he had no objection to this and the Commission's Delegate acknowledged that the settlement satisfied the individual interest in the case. He pointed out, however, that neither the content nor the timing of proposed legislation had been indicated and that publication of the Commission's report, whatever its effect on practice, would not in itself change the law. The Commission therefore proposed that the Court should not strike the case from its list, but should adjourn it until details of the legislative programme were available.

The Court disagreed. Taking formal note of the friendly settlement, it examined the applicant's position and held that as far as the general interest was concerned, there was no reason to defer judgment, or proceed to the merits of the case. It therefore concluded that it would be appropriate to strike the case off its list.

The three judges who dissented from this conclusion<sup>88</sup> went somewhat further than the Commission's recommendation and maintained that in the general interest the Court should proceed immediately to the merits of the case. This was because the intended reforms were unclear and because the main issue in the

<sup>86</sup> See Drzemczewski, *New Law Journal*, 134 (1984), pp. 218–19.

<sup>87</sup> ECHR, judgment of 2 October 1984, Series A, No. 83. The Court consisted of the following Chamber of Judges: Wiarda (President); Ryssdal, Ganshof van der Meersch, Lagergren, García de Enterría, Sir Vincent Evans, Bernhardt (Judges).

<sup>88</sup> Judges Wiarda, Ryssdal and Ganshof van der Meersch, who delivered a joint dissenting opinion.

case—whether the district prosecutor could be regarded as an ‘officer authorized by law to exercise judicial power’—raised an important question of principle.<sup>89</sup>

It is unusual for the Court to be so divided over the question of whether a case should be removed from its list. Although the Commission and the dissenting judges proposed different alternatives, they shared the belief that when a breach of the Convention has been identified, a friendly settlement should not be approved unless it is absolutely clear that steps to correct any systemic deficiencies are being taken. Such a view has much to commend it. Whilst it would not be appropriate for the good faith of a Contracting State to be called into question, once a case has reached the threshold of the Court, it seems reasonable to require a guarantee that the Convention will be respected before removing it from the list.

*Meaning of ‘independent and impartial’ tribunal (Article 6 (1))—just satisfaction (Article 50)*

*Case No. 15. Sramek case.*<sup>90</sup> In this case, which concerned Austria, the Court decided by 13 votes to 2 that there had been a violation of Article 6 (1) of the Convention because the independence of the Regional Real Property Transactions Authority, which had dealt with a case involving the applicant, was open to legitimate doubt. The Court held unanimously that the applicant was to receive 100,000 schillings in respect of her costs and expenses, but rejected by 14 votes to 1 the remainder of the claim for just satisfaction.

The applicant was a United States citizen who lived in the Federal Republic of Germany and wished to buy land in the Austrian Tyrol. Under Austrian law sales of land to foreigners must be approved by the local Real Property Transactions Authority, whose function is to ensure that the transaction is not contrary to political, economic, social or cultural interests, which include the risk of foreign domination in the municipality or locality concerned. Mrs Sramek concluded a contract which was approved by the relevant local Authority. On appeal by the Transactions Officer, however, the Regional Real Property Transactions Authority reversed this decision in view of the danger of foreign domination. An appeal by Mrs Sramek to the Constitutional Court was unsuccessful.

In her application to the Commission Mrs Sramek invoked Article 6 (1) of the Convention and in particular her right to a ‘fair and public hearing . . . by an independent and impartial tribunal . . .’. By a majority of 11 votes to 1 the Commission expressed the opinion that there had been a breach of that article. The Commission and the Government then referred the case to the Court.

The crucial question was whether the Tyrol Regional Real Property Transactions Authority (‘the Authority’), by reason of its composition and the manner of appointment of its members, exhibited the independence and impartiality required by the Convention. In the *Ringeisen* case<sup>91</sup> in 1971 the Court decided that the corresponding tribunal for Upper Austria satisfied these requirements. For two members of the Court the earlier decision was conclusive.<sup>92</sup> To the majority, however, the cases were distinct.

<sup>89</sup> The Court’s view of the position of the *auditeur-militaire* in Cases Nos. 8, 9 and 10 is an instructive comparison.

<sup>90</sup> ECHR, judgment of 22 October 1984, Series A, No. 84. The case was decided by the plenary Court.

<sup>91</sup> ECHR, judgment of 16 July 1971, Series A, No. 13. See also this *Year Book*, 46 (1971–2), p. 470.

<sup>92</sup> See the dissenting opinion of Judges Sir Vincent Evans and Gersing.

The membership of the Authority was diverse, consisting of a local mayor, who was chairman, a judge, a farmer, a lawyer and three civil servants from the Office of the *Land* Government, one of whom acted as *rapporteur*. As in *Campbell and Fell* (Case No. 11), the Court found that arrangements relating to their manner of appointment, terms of office and tenure satisfied the Convention. For although the members were (with one exception) appointed by the *Land* Government, they sat in an individual capacity and could not be given instructions by the executive.

The difficulty stemmed from the position of the civil servants and in particular the *rapporteur*. In the *Ringeisen* case the Court found the presence of civil servants on the Upper Austrian tribunal to be unobjectionable. Here, however, the *Land* Government, represented by the Transactions Officer, was a party to the proceedings before the Authority and the *rapporteur* had the Transactions Officer as his hierarchical superior. There was no evidence that the latter had taken advantage of his position to give the *rapporteur* instructions. Indeed, as already noted, this was expressly forbidden. Nevertheless, in accordance with its view that for maintaining confidence in the courts, appearances are important,<sup>93</sup> the Court held that the presence of one of the Transactions Officer's subordinates on the Authority was not acceptable. In view therefore of the legitimate doubt which a litigant might entertain about his independence, the Court held that there had been a breach of Article 6 (1).

In her claim for compensation under Article 50 Mrs Sramek requested a sum calculated by reference to what she would now have to pay for the type of site she had in mind. As the Court pointed out, this assumed that a properly constituted Authority would have approved the contract of sale. Since there was no evidence that this was so, the Court, with one dissentient,<sup>94</sup> rejected the claim for pecuniary compensation and limited its award of just satisfaction to the applicant's legal costs.

It is difficult to avoid the impression that if the *Ringeisen* case called for decision today, or the present case had occurred in 1971, the results might well be different. While the facts of the two cases are by no means identical, the idea that justice must be seen to be done has developed to the point where, as the minority put it, 'the mere appearance of . . . a possibility' of bias may suffice. This is a delicate issue and there may perhaps be room for a stricter standard in criminal than in civil cases. It should be noted that the Court did not decide that the presence of civil servants as such was improper, a view advanced by two members of the Court,<sup>95</sup> which would extend the Convention's requirements even further.

#### *Just satisfaction (Article 50)—costs covered by insurance—evidence*

*Case No. 16. Öztürk case* (Application of Article 50).<sup>96</sup> The Court unanimously rejected the applicant's claims under Article 50 on the ground that he had failed to make out any case for just satisfaction.

<sup>93</sup> See the *Piersack* case, Series A, No. 53, and this *Year Book*, 53 (1982), p. 321.

<sup>94</sup> In a dissenting opinion Judge García de Enterría held that deprivation of the applicant's right to a proper trial of her action over a long period of time constituted specific damage, calling for financial compensation.

<sup>95</sup> The separate concurring opinion of Judges Ganshof van der Meersch and Evrigenis suggested that there was a clear distinction to be drawn between the facts of the present case and those of *Ringeisen* on this point.

<sup>96</sup> ECHR, judgment of 23 October 1984, Series A, No. 85. French text authentic. The Court consisted of the following Chamber of Judges: Wiarda (President); Ryssdal, Thór Vilhjálmsson, Ganshof van der Meersch, Matscher, Walsh, Bernhardt (Judges).

The judgment of the plenary Court on the merits (Case No. 4 above) held that there had been a breach of Article 6 (3) (c) of the Convention because the applicant had not received the free assistance of an interpreter during proceedings before the Heilbronn District Court. The Court reserved the question of just satisfaction under Article 50 and referred it to the Chamber initially constituted to hear the case.

Article 50 of the Convention provides:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

In the present proceedings the applicant sought two sums by way of just satisfaction: DM 63.9 as reimbursement of the fees which had been paid to his interpreter and DM 3,000 as legal costs incurred before the Convention institutions. The Court rejected both claims. The interpreter's fees had been paid by the applicant's insurance company and not by the applicant personally. Thus there was 'no prejudice capable of being the subject of a claim for restitution'.<sup>97</sup> The legal fees, on the other hand, had been notified by the applicant's lawyer orally, but no particulars or documentary corroboration had been supplied, despite a request to this effect from the Secretary to the Commission. In these circumstances the Court agreed with the Commission and the Government that this claim also must be regarded as unfounded.

*Just satisfaction (Article 50)—causation—costs and expenses*

*Case No. 17. Piersack case* (Application of Article 50).<sup>98</sup> The Court held unanimously that Belgium should refrain from recovering 51,978 Belgian francs in court costs arising out of criminal proceedings involving the applicant and should pay him 275,000 Belgian francs, less 3,500 French francs, in respect of legal costs in Belgium and at Strasbourg.

In its judgment on the merits in 1982 the Court held that there was a breach of Article 6 (1) of the Convention when the Brabant Assize Court tried the applicant on a criminal charge in circumstances in which its impartiality 'was capable of appearing open to doubt'.<sup>99</sup> The question of just satisfaction under Article 50 was reserved for later consideration.

In his initial application Mr Piersack, who had been sentenced to eighteen years' hard labour for murder, requested his immediate release 'in accordance with arrangements to be discussed'. However, following the Court's decision on the merits, the Belgian Court of Cassation annulled the first judgment and ordered a retrial before a different court. In the new proceedings, which took place in 1983, the applicant was convicted again and given the same sentence. Because the applicant accepted that his retrial had been fair, the Commission then took the view that 'a result as close to *restitutio in integrum* as was possible in the nature of

<sup>97</sup> Judgment, para. 8.

<sup>98</sup> ECHR, judgment of 26 October 1984, Series A, No. 85. French text authentic. The Court consisted of the following Chamber of Judges: Wiarda (President); Thór Vilhjálmsson, Ganshof van der Meersch, Lagergren, Gölcüklü, Matscher, Bernhardt (Judges).

<sup>99</sup> ECHR, judgment of 1 October 1982, Series A, No. 53, and see this *Year Book*, 53 (1982), p. 321.

things'<sup>100</sup> had been achieved and that the violation of Article 6 (1) had been redressed. In its present judgment the Court agreed and held that since the applicant's loss of liberty was now in no way attributable to the breach of the Convention, there was no call for redress under Article 50.

There remained the question of Mr Piersack's costs and expenses. As regards the costs incurred in Belgium, the Court held that the applicant was entitled to be released from liability to pay for his initial attempt to challenge the judgment of the Brabant Assize Court and was entitled to recover half of his lawyer's fees in those proceedings.<sup>101</sup> In respect of the two criminal trials the Court found that Mr Piersack's claim for lawyer's fees was excessive and with reference to court fees noted that the Government claimed no right to recover the cost of the first trial, and that the applicant was in principle entitled to be relieved of the cost of the second trial, since this was a means of obtaining reparation for the breach of the Convention. However, though the applicant should not suffer financially for the breach, nor should he profit from it. Since he would normally have had to pay for the first proceedings, he was relieved from liability in respect of the second proceedings only to the extent that the latter were more expensive.

As regards the costs of legal representation at Strasbourg, the Court deducted the sum of 3,500 French francs which had been granted as legal aid, and imposed a further reduction of one-third in view of the lack of particulars and other evidentiary deficiencies.

*Right to a hearing by an impartial tribunal (Article 6 (1))—application to criminal trial at first instance*

*Case No. 18. De Cubber case.*<sup>102</sup> The Court held unanimously that Belgium had violated Article 6 (1) of the Convention because the impartiality of the court which had tried the applicant on criminal charges was capable of appearing to him to be open to doubt.

In Belgium investigating judges, who are appointed by the Crown from among the judges of the court of first instance, conduct the preparatory judicial investigation in criminal cases. They have the status of officer of the criminal investigation police and are invested with wide powers. The 1967 Judicial Code prohibits the concurrent exercise of different judicial functions. Thus a judicial officer who has acted in a case as investigating judge cannot sit in that case in the assize court, or as an appeal court judge. On the other hand, he is permitted to try at first instance a case which he has previously investigated.

Mr De Cubber was a sales executive whom the Belgian authorities suspected of forgery. In April 1977 Mr Pilate, an investigating judge at the Oudenaarde district court, issued a warrant for his arrest and subsequently investigated two other cases concerning similar allegations. In the first case Mr De Cubber was convicted and sentenced to one year's imprisonment. The two other cases were joined and

<sup>100</sup> Judgment, para. 11.

<sup>101</sup> The full sum was not recoverable because only one part of the appeal related to the breach of the Convention. The proceedings in the Court of Cassation following the decision on the merits in the European Court did not involve the applicant in any expense.

<sup>102</sup> ECHR, judgment of 26 October 1984, Series A, No. 86. The Court consisted of the following Chamber of Judges: Wiarda (President); Ganshof van der Meersch, Bindschedler-Robert, Gölcüklü, Matscher, Sir Vincent Evans, Bernhardt (Judges).

referred to a court of three judges, including Mr Pilate, which also convicted and sentenced him to terms of imprisonment. One of these sentences was reduced on appeal, but a further appeal to the Court of Cassation was unsuccessful.

In his application to the Commission Mr De Cubber complained that the Oudenaarde criminal court had not constituted an impartial tribunal, as required by Article 6 (1) of the Convention, in view of Mr Pilate's previous involvement in the case. In its report of July 1983 the Commission expressed the unanimous opinion that there had been a violation of that article and then referred the case to the Court.

In its judgment in the *Piersack* case<sup>103</sup> in 1982 the Court held that for the purposes of the Convention impartiality can be tested in two ways: by reference to the personal convictions of a given judge, a subjective approach, and by determining 'whether he offered guarantees sufficient to exclude any legitimate doubt in this respect', an objective approach. In the present proceedings the applicant had begun by challenging Mr Pilate's personal impartiality,<sup>104</sup> but had abandoned this line of argument at an early stage. Since it is established that personal impartiality is presumed unless there is proof to the contrary, the question for the Court was whether the arrangement under which an investigating judge sat on the same case at first instance satisfied the objective test.

The Government's argument was that it did because investigating judges are fully independent, do not have the status of a party to criminal proceedings, assemble evidence both for and against the accused and are not empowered to commit him for trial, or to express any opinion on his guilt. The Court recognized the cogency of this reasoning, but explained that a number of other factors had led it to conclude that the combination of judicial functions involved here was not compatible with the Convention.

Explaining that as an officer of the criminal investigation police, an investigating judge is placed under the supervision of the State prosecutor, the Court stressed the wide range of his powers, which appeared to have been fully used in the present case. Moreover, preparatory investigations are secret, inquisitorial in nature and not conducted in the presence of both parties. Accordingly, said the Court, 'one can . . . understand that an accused might feel some unease should he see on the bench of the court called upon to determine the charge against him the judge who had ordered him to be placed in detention on remand and who had interrogated him on numerous occasions during the preparatory investigation, albeit with questions dictated by a concern to ascertain the truth'.<sup>105</sup>

Finally, there was the point that an investigating judge was bound to have developed a detailed knowledge of the case before the hearing began. In the eyes of the accused he might therefore appear to be in a position to influence the outcome of the trial, or 'even to have a preformed opinion which is liable to weigh heavily in the balance at the moment of decision'.<sup>106</sup> By prohibiting certain combinations of judicial functions the legislature had been concerned to remove the taint of

<sup>103</sup> ECHR, judgment of 1 October 1982, Series A, No. 53. See also this *Year Book*, 53 (1982), p. 321.

<sup>104</sup> In addition to the present proceedings, Mr Pilate had been involved in various capacities with other cases brought by or against the applicant over the previous ten years. This involvement, which was the basis of the original allegation that he had shown himself 'somewhat relentless' in regard to the applicant's affairs, is described in para. 9 of the Court's judgment.

<sup>105</sup> Judgment, para. 29.

<sup>106</sup> *Ibid.*

partiality from assize and appeal courts. However, exactly the same considerations were relevant to courts of first instance. Because, therefore, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt, there had been a breach of Article 6 (1).

Although the Court arrived at its conclusion by following the principles laid down in *Piersack*, the facts were significantly different. The earlier case concerned a judge who had presided over an assize court after previously acting as head of the section of the public prosecutor's department which had been responsible for dealing with the accused's case. The present case extends the concept of 'objective impartiality' to circumscribe the activities of investigating judges and will have significant institutional implications. The Government argued that with more and more cases to be dealt with, the Belgian legal system would break down if the limited number of judges were unable to perform multiple functions. As in *Guincho* (Case No. 12), however, this attempt to plead that pressure on judicial resources is a factor which may condition a State's obligations did not impress the Court.

In the light of the Court's observations in cases involving the application of Article 6 (1) to administrative and disciplinary proceedings,<sup>107</sup> the Government also argued that provided the Convention's requirements are observed on appeal, it is unnecessary for them to be satisfied at first instance. This extraordinary suggestion, which would mean that the rights of the accused in a criminal trial can be reduced by the provision of facilities for appeal, was also rejected.

*Right of a person held in detention to be brought promptly before a judge or other judicial officer (Article 5 (3))—right to have the lawfulness of detention decided speedily (Article 5 (4))—jurisdiction of the Court—just satisfaction (Article 50)*

*Case No. 19. McGoff case.*<sup>108</sup> The Court held unanimously that Sweden had violated Article 5 (3) of the Convention because the applicant had not been brought promptly before a judge or other officer authorized to exercise judicial power after his arrest. A claim under Article 5 (4) of the Convention was dismissed and the applicant was awarded the sum of 2,070.25 Irish pounds in respect of his costs and expenses.

The applicant, an Irishman, was wanted by the Swedish authorities on various charges including narcotics offences. In 1977 a Stockholm court issued a warrant for his arrest and on 24 January 1980, following his arrest in the Netherlands, he was extradited to Sweden and taken into custody. On 8 February the Stockholm District Court held a hearing and ordered the detention to be continued. He was eventually convicted and sentenced to two years' imprisonment.

In his application to the Commission in 1980 Mr McGoff complained *inter alia* of breaches of Articles 5 (3) and 5 (4) of the Convention and also of Article 25, on the ground that he had been prevented from writing to the Commission. The Commission decided to take no action with regard to the last complaint, but in its report of July 1983 expressed the unanimous opinion that there had been a breach of Article 5 (3), though not of Article 5 (4).

<sup>107</sup> See, e.g., the *Albert and Le Compte* case, Series A, No. 58, para. 29, and this *Year Book*, 54 (1983), p. 319.

<sup>108</sup> ECHR, judgment of 26 October 1984, Series A, No. 83. The Court consisted of the following Chamber of Judges: Wiarda (President); Ganshof van der Meersch, Lagergren, García de Enterría, Sir Vincent Evans, Macdonald, Bernhardt (Judges).

The Court's judgment was brief and to the point. Holding that the Commission's treatment of the claim under Article 25 amounted to a declaration of inadmissibility, the Court decided that it had no jurisdiction to entertain this complaint. Explaining that in Swedish law the applicant could appeal against the arrest warrant at any time, the Court agreed with the Commission that this provided the applicant with the necessary opportunity to take proceedings to test the lawfulness of his detention and so there had been no violation of Article 5 (4).

Finally, on the issue of Article 5 (3), the Court noted that the Swedish court issued the arrest warrant in 1977 without hearing Mr McGoff in person and that when he was taken into custody in Sweden, fifteen days elapsed before he was brought before the District Court. Deciding that this period was not consistent with the obligation to arrange a hearing promptly, the Court, like the Commission, held that there had been a breach of Article 5 (3).

The claim for just satisfaction under Article 50 fell into two parts. A request by the applicant that the Court should require the Swedish Government to take 'prompt and effective steps' to prevent such breaches in the future was rejected on the familiar ground that it is for the State to choose the means by which it will perform its obligations under the Convention.<sup>109</sup> On the other hand, the applicant's claim for costs and expenses, which was not challenged, was granted in full.

Comparison of the present case with *de Jong, Baljet and van den Brink* (Case No. 8) is instructive. There, it will be recalled, the Court held that six days after arrest the limits laid down by the Convention had already been exceeded.<sup>110</sup> The present case, in which the period without access to a judge was more than twice as long, was therefore quite straightforward and confirms the impression left by *Skoogström* (Case No. 14), that on the issue of pre-trial detention Swedish criminal procedure leaves something to be desired.

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<sup>109</sup> See, e.g., the *Campbell and Cosans* case (Application of Article 50), Series A, No. 60, and this *Year Book*, 54 (1983), p. 324. The Court noted that the Swedish Government had stated its willingness 'to propose such amendments to the Code of Judicial Procedure as should be required in order to put it beyond any doubt that Swedish law on this point is in conformity with the Convention': judgment, para. 26.

<sup>110</sup> The reference is to the Court's treatment of Article 5 (4) in the earlier case. For the purpose of Article 5 (3) the periods ranged from eight to fourteen days.

# DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES DURING 1983–4\*

*International organizations—criteria for appointment of officials—ability versus geographical distribution*

*Case No. 1. Ragusa v. Commission of the European Communities.*<sup>1</sup> Article 27 of the Staff Regulations of the European Communities provides:

Recruitment shall be directed to securing for the institution the services of officials of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of member States of the Communities.

Officials shall be selected without reference to race, creed or sex.

No posts shall be reserved for nationals of any specific member State.

Many international organizations have rules resembling the first paragraph of Article 27, but few have rules resembling the third paragraph; consequently judgments dealing with the first paragraph are more likely to be applicable by analogy to other international organizations than judgments dealing with the third paragraph of Article 27.

If the administration tries to reserve a post for the nationals of a specific member State, the resulting appointment can be annulled for breach of the third paragraph of Article 27.<sup>2</sup> But excessive reliance on nationality can also be a breach of the first paragraph of Article 27. In *Ragusa v. Commission of the European Communities* the Court of Justice of the European Communities said:

According to the first paragraph of Article 27 of the Staff Regulations, the appointing authority must ensure that recruitment is carried out on as wide a geographical basis as possible amongst nationals of the member States. However, that objective must be secondary to the requirements of the interests of the service and to consideration of the ability, efficiency and integrity of officials, which are also referred to in that provision. Only where the merits and qualifications of the various candidates are equal may the appointing authority take into consideration the nationality of a candidate as one factor amongst others in its choice. In this case, however, there is nothing to suggest that the Director General of the Joint Research Centre disregarded those principles and gave too much weight to the criterion of the nationality of the candidates.<sup>3</sup>

A similar judgment was handed down by the United Nations Administrative Tribunal in 1983 in the case of *Estabial v. Secretary-General of the United Nations*.<sup>4</sup> The applicant, who was already a United Nations staff member, applied for a more senior post in the Secretariat. The administration did not take his candidature into consideration because the Secretary-General had decided to reserve the post for candidates from French-speaking African countries. The

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<sup>1</sup> [1983] ECR 1245.

<sup>2</sup> This happened in *Schloh v. Council*, [1983] ECR 2105.

<sup>3</sup> [1983] ECR 1245, 1258. The judgment in this case is more forthright than the earlier judgments discussed in Akehurst, *The Law Governing Employment in International Organizations* (1967), p. 154.

<sup>4</sup> Judgment No. 310, UN Doc. AT/DEC/310.

Tribunal held that the administration had violated United Nations Staff Regulations and Article 101 (3) of the United Nations Charter, which provides:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

The Tribunal said that the Secretary-General should not alter the conditions laid down in Article 101 (3) by establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount condition set by the Charter, namely, 'the necessity of securing the highest standards of efficiency, competence, and integrity'. The applicant was therefore entitled to compensation. Similar judgments have also been given by the NATO Appeals Board<sup>5</sup> and the Administrative Tribunal of the Organization of American States.<sup>6</sup>

*Trade between member States—quantitative restrictions on imports and measures having equivalent effect—implied powers of member States—protection of consumers*

*Case No. 2. Schutzverband gegen Unwesen in der Wirtschaft v. Weinvertriebs-GmbH.*<sup>7</sup> According to Italian law, the alcoholic content of vermouth marketed in Italy must be at least 16 per cent by volume. Nevertheless by way of exception vermouth with an alcoholic content of less than 16 per cent may be produced in Italy provided that it is intended for export. The West German Wine Law of 14 July 1971 imposes no minimum limit on the alcoholic content of vermouth; however, paragraph 32 (1) thereof provides: 'Wine-based beverages produced abroad . . . may be imported only if the whole production has taken place in one and the same State according to the provisions applicable there and the product may be marketed there for the purpose of being consumed in an unaltered state . . .'. The result was a ban on the importation into West Germany of Italian vermouth with an alcoholic content less than 16 per cent. A West German court wanted to know whether such a ban constituted a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the EEC Treaty.<sup>8</sup> It therefore referred the following question to the Court of Justice of the European Communities under Article 177 of the EEC Treaty:

Is the interpretation of a statutory provision in member State A, whereby vermouth produced in member State B is not marketable in member State A because it has slightly less than the minimum alcoholic content prescribed by law in member State B, compatible with Article 30 . . . of the EEC Treaty even though no minimum content for domestic vermouth is prescribed in member State A and accordingly had the vermouth been produced in member State A it would have been freely marketable there?

The Court of Justice of the European Communities said:

. . . a provision of the importing member State fixing a minimum degree of alcohol only for

<sup>5</sup> Decisions Nos. 7 (1968, 43 ILR 330) and 65 (a) (1975, unreported), holding that it is unlawful to dismiss an official on the grounds of his nationality.

<sup>6</sup> *Caserta v. Secretary-General of the OAS*, Judgment No. 14, 1975, unreported.

<sup>7</sup> [1983] ECR 1217.

<sup>8</sup> Article 30 of the EEC Treaty provides: 'Quantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between member States'.

imported vermouth prevents the marketing of a product lawfully made in the exporting member State, whereas it imposes no condition in relation to the minimum content of alcohol for the marketing of similar domestic products.

Since such a provision affects only imported products, it is of a discriminatory nature.

The fact that the law in issue refers to the rules governing production in the exporting member State does not affect the aforesaid conclusion since the discriminatory nature must be determined solely on the basis of the law of the State where the marketing takes place, that is to say, the importing member State.

The Schutzverband nevertheless maintained that the rule was justified on the ground that German consumers, in particular the very large number that visits Italy each year, expect Italian vermouth marketed in the Federal Republic of Germany to be identical to the vermouth marketed in Italy and that they would therefore be misled by Italian vermouth the alcoholic content of which by volume is less than that of the same vermouth drunk by them in Italy.

Although it is true that . . . the Court has repeatedly stated that protection of consumers, in particular, may justify obstacles to the free movement of goods resulting from disparities in national rules, the discriminatory nature of the rule in question excludes application of that criterion, which concerns only legislation governing the marketing of national and imported products uniformly. Therefore in the present case it is not possible to plead consumer protection to exclude Article 30 since the same protection is not given in relation to the national products.

The . . . question must therefore be answered to the effect that a ban on the import of vermouth the alcoholic content of which is less than the minimum prescribed in the exporting member State for marketing on its domestic market, when no such minimum is prescribed for the marketing of vermouth produced in the importing member State, is to be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by Article 30 of the Treaty.

It is apparent from the Court's judgment that a ban on imported weak vermouth would have been perfectly lawful if it had been accompanied by a similar ban on weak locally produced vermouth. Such a ban on imports cannot be 'justified on grounds of . . . the protection of health and life of humans, animals or plants' within the meaning of Article 36 of the EEC Treaty;<sup>9</sup> such a ban does not protect the *health or life* of consumers. But it does protect consumers against being *deceived*, and the Court held in *Commission v. Ireland* that 'in the absence of common rules<sup>10</sup> relating to the production and marketing of the product in question it is for the member States to regulate all matters relating to its production, distribution and consumption on their own territory subject, however, to the condition that those rules do not present an obstacle . . . to intra-Community trade', and that 'where national rules, which apply without discrimination<sup>11</sup> to both domestic and imported products, may be justified as being necessary in order to satisfy imperative requirements relating in particular to . . .

<sup>9</sup> Article 36 of the EEC Treaty provides: 'The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between member States.'

<sup>10</sup> Where 'common rules' exist, in the form of a directive for the approximation of national laws under Article 100 of the EEC Treaty, all measures of protection must be 'adopted within the framework outlined by the harmonizing directive': *Tedeschi v. Denkavit*, [1977] ECR 1555, 1576-7.

<sup>11</sup> On the meaning of discrimination, see *Commission v. Ireland*, [1981] ECR 1625, 1639-41.

the fairness of commercial transactions and the defence of the consumer [against deception] . . . they may constitute an [*implied*] exception to the requirements arising under Article 30'.<sup>12</sup> In the past the Court of Justice of the European Communities has used the doctrine of implied powers to extend the powers of the Community;<sup>13</sup> the judgment in *Commission v. Ireland* indicates that the doctrine of implied powers may sometimes be used to extend the powers of member States.

It is for the member State in question to satisfy the Court that the national rules in dispute are *justified* by the need to protect consumers against injury or deception, or by the need to prevent unfair competition. Where there is genuine room for argument about the need for such measures, the Court will give the member State the benefit of the doubt,<sup>14</sup> but the Court will declare national measures to be unlawful when there are no reasonable grounds for regarding them as necessary to protect consumers against injury or deception, or to prevent unfair competition.<sup>15</sup> Moreover, even when national measures are justified in principle, they must not discriminate against goods imported from other member States, and they must be proportionate to the aim in view; if a member State has a choice between various measures to attain the same objective, it must choose the means which least restrict the free movement of goods.<sup>16</sup>

*Exclusive fishing zones—distinction between conservation of fisheries and exclusion of foreign fishing vessels—human rights—non-retroactivity of criminal laws*

*Case No. 3. R v. Kirk.*<sup>17</sup> Articles 100 and 101 of the 1972 Act of Accession (annexed to the Treaty of Accession whereby Denmark, Ireland and the United Kingdom joined the European Communities) permitted member States to exclude fishing vessels of other member States from fishing within six miles (or, in some areas, twelve miles) from their coasts until the end of 1982. These provisions constituted a derogation from EEC Regulations 2141/70 and 101/76, which gave fishing vessels from each member State the right to fish in the territorial sea and fishing zones of other member States. Article 103 of the Act of Accession provided:

Before 31 December 1982, the Commission shall present a report to the Council on the economic and social development of the coastal areas of the member States and the state of stocks. On the basis of that report, and of the objectives of the common fisheries policy, the Council, acting on a proposal from the Commission, shall examine the provisions which could follow the derogations in force until 31 December 1982.

At the end of 1982 the member States had not reached agreement on provisions to replace Articles 100 and 101; agreement was finally reached on 23 January 1983.<sup>18</sup> In the meantime, the United Kingdom and certain other member States

<sup>12</sup> [1981] ECR 1625, 1639.

<sup>13</sup> See, in the context of the implied treaty-making power of the EEC, *Commission v. Council*, [1971] ECR 263 (this *Year Book*, 46 (1972-3), p. 439), and the *Rhine Barges* case, [1977] ECR 741 (ibid. 49 (1978), p. 322).

<sup>14</sup> *Sandoz*, [1983] ECR 2445.

<sup>15</sup> *Gilli and Andres*, [1980] ECR 2071, 2077-9, 2082-4.

<sup>16</sup> *Rau v. de Smedt*, [1982] ECR 3961; *Commission v. United Kingdom*, [1982] ECR 2793; *Commission v. United Kingdom*, [1983] ECR 203; *Frans-Nederlandse Maatschappij voor Biologische Producten*, [1981] ECR 3277.

<sup>17</sup> [1984] 3 CMLR 522.

<sup>18</sup> Article 6 (1) of Council Regulation 170/83 of 25 January 1983 authorizes retroactively, as from 1 January 1983, the retention of the derogation regime defined in Article 100 of the Act of Accession for a further ten years.

had promulgated national rules concerning fisheries; these rules corresponded to the proposals which the Commission had unsuccessfully put to the Council, and were approved by the Commission. The British rules included the Sea Fish Order 1982, which prohibited fishing by Danish vessels within twelve miles of the British coast. Mr Kirk, the master of a Danish trawler, was prosecuted under this Order, and pleaded that it was contrary to Community law. The Newcastle upon Tyne Crown Court sought a preliminary ruling on the legality of the Order from the Court of Justice of the European Communities under Article 177 of the EEC Treaty.

The Court of Justice of the European Communities said:

Mr Kirk takes the view . . . that the rules which applied prior to the 1972 Act of Accession became fully applicable on the expiry of the derogations permitted during the transitional period, which ended on 31 December 1982. Those rules, codified in Council Regulation (EEC) 101/76, include the principle of non-discrimination and therefore the exclusion of Danish vessels under the Sea Fish Order 1982 is contrary to Community law.

It should be borne in mind, in this respect, that Article 7 of the EEC Treaty provides that within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited.

Council Regulation 101/76 laying down a common structural policy for the fishing industry, which replaced Council Regulation 2141/70 of 20 October 1970, provides, in Article 2 (1), which is identical to Article 2 (1) of Regulation 2141/70, that rules applied by each member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must not lead to differences in treatment of other member States. Member States must ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to for all fishing vessels flying the flag of a member State and registered in Community territory.

The Court then cited Articles 100 and 103 of the Act of Accession, reviewed the events leading up to the promulgation of the Sea Fish Order 1982 and its approval by the Commission, and continued:

It follows from the above-mentioned provisions of Articles 100 and 103 of the 1972 Act of Accession that the measures derogating from a fundamental principle of Community law, namely non-discrimination, were limited to the transitional period and that the power to bring into force any provisions thereafter was entrusted to the community authorities, in particular to the Council.

It cannot be concluded from the fact that the Council failed to adopt such provisions within the period provided for in Article 103 that the member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time limits.

It follows that at the time of the events at issue before the national court, Article 2 (1) of Regulation 101/76, which provided for equal conditions of access to waters coming within the jurisdiction of member States and, in consequence, the abolition of all discrimination based on nationality against nationals of member States, was fully applicable.

The United Kingdom and the Commission claim that the fact that after the end of the transitional period the measures prescribed by Article 103 of the Act of Accession were not adopted created a legal vacuum which the member States were entitled to fill as 'trustees' of the common interest by measures approved by the Commission, as was recognised by the Court in its judgment of 5 May 1981.<sup>19</sup>

<sup>19</sup> *Commission v. United Kingdom*, [1981] ECR 1045 (this *Year Book*, 53 (1982), p. 331), followed and interpreted in *Gewiese and Mehlich v. Mackenzie*, [1984] 2 CMLR 409.

In the said judgment of 5 May 1981 the Court stated that in the absence of Community rules, member States had the power to take temporary measures for the conservation of fishery resources in order to avoid irreparable damage contrary to the objectives of the common conservation policy.

Although, as the United Kingdom points out, rules relating to access may in certain cases constitute a response to a concern to conserve fishery resources, it is clear that in this instance the disputed measure was not intended to achieve such an objective. National rules which prohibit access to national waters and which are not intended to achieve an objective of conservation can not be covered by the power of member States, recognized in the aforementioned judgment of 5 May 1981, to take temporary conservation measures.

The Commission nevertheless contends that the member States were empowered to adopt measures such as the Sea Fish Order 1982 by Article 6 (1) of Regulation 170/83 of 25 January 1983 which authorizes retroactively, as from 1 January 1983, the retention of the derogation régime defined in Article 100 of the 1972 Act of Accession for a further ten years, and which extends the coastal zones from six to twelve nautical miles. In the Commission's view, the Sea Fish Order 1982 constituted a proper exercise of the authorization under Regulation 170/83 in view of the particular circumstances prevailing at that time.

Without embarking upon an examination of the general legality of the retroactivity of Article 6 (1) of that regulation,<sup>20</sup> it is sufficient to point out that such retroactivity may not, in any event, have the effect of validating *ex post facto* national measures of a penal nature which impose penalties for an act which, in fact, was not punishable at the time at which it was committed. That would be the case where at the time of the act entailing a criminal penalty, the national measure was invalid because it was incompatible with Community law.

The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

Consequently the retroactivity provided for in Article 6 (1) of Regulation 170/83 cannot be regarded as validating *ex post facto* national measures which imposed criminal penalties, at the time of the conduct in issue, if those measures were not valid.

It follows from the foregoing considerations that Community law regarding fishing did not authorize a member State, at the time of the adoption of the Sea Fish Order 1982, to prohibit vessels registered in another named member State from fishing within a coastal zone specified by that order and not covered by conservation measures.

MICHAEL AKEHURST

<sup>20</sup> Retroactive regulations are normally invalid, but there are some exceptions; see this *Year Book*, 52 (1981), p. 45, and Schermers, *Judicial Protection in the European Communities* (3rd edn., 1983), pp. 51-7.

# UNITED KINGDOM MATERIALS ON INTERNATIONAL LAW 1984\*

*Edited by* GEOFFREY MARSTON<sup>1</sup>

[*Editorial note:* Attention is drawn to the editorial note in UKMIL 1983, p. 361. The publication schedule of the present edition of UKMIL has again permitted the citation of column references in the bound, definitive, volumes of the Parliamentary Debates]

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<sup>2</sup> Based on the *Model Plan for the Classification of Documents concerning State Practice in the field of Public International Law* adopted by the Committee of Ministers of the Council of Europe in Resolution (68) 17 of 28 June 1968.

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*Abbreviations*

- HC Debs. *Hansard*, House of Commons Debates (6th series)
- HL Debs. *Hansard*, House of Lords Debates (5th series)
- Cmd. Command Paper (4th series)
- Cmnd. Command Paper (5th series)
- UKMIL *United Kingdom Materials on International Law*
- UKTS *United Kingdom Treaty Series*

**Part One: II. D. *International law in general—relationship between international law and municipal law—implementation of international law in municipal law***

(See also Part Three: II. A. 1. (c) (items of 17 July 1984 and 13 December 1984), Part Six: I. C. (item of 21 May 1984), and Part Twelve: II. H. 2., below.)

In the course of the second reading debate in the House of Commons on the Data Protection Bill, the Secretary of State for the Home Department, Mr Leon Brittan, remarked:

As long ago as 1968 the Parliamentary Assembly of the Council of Europe addressed a recommendation to the Committee of Ministers expressing concern about whether, in the context of automated data banks, the European convention on the protection of human rights and the domestic law of member states provided adequate protection for personal privacy. This recommendation led to others and ultimately to the European convention on data protection, which was opened for signature in 1981 and which the United Kingdom has signed but cannot ratify until we have our own legislation in place. The OECD has also been active in this area, producing a set of guidelines governing the protection of privacy and trans-border flows of personal data which the United Kingdom endorsed in 1981.

This international concern adds a new dimension. Business depends more and more on the free flow of data—often personal data—between countries. This free flow of information must continue if business is to flourish. At the same time, however, the threat to the individual becomes potentially greater when data are used not only at home but in other countries and in circumstances over which the subject, and often the person passing on the information, has little control. In recognition of this, the convention and the guidelines both confirm the right of countries which have introduced data protection safeguards to restrict the flow of personal data to other countries which do not offer comparable protection.

... ratification is important for two reasons. First, it will reassure people in this country that when computers are used for the storage and use of personal data there are special safeguards for individual privacy which are well up to the international standard. Secondly, ratification will gain us membership of what one might call the European data protection club, thus ensuring a very important commercial interest—that British firms are not placed at a disadvantage in relation to firms in other European countries.

(HC Debs., vol. 53, cols. 31–2: 30 January 1984)

Later, the Minister said:

The Bill aims to strike a reasonable balance within the constraints of the convention, ratification of which must be the central target of the legislation.

(Ibid., col. 32)

In reply to a question, the Minister of State, Home Office, wrote:

The provisions of the Council of Europe convention for the protection of individuals with regard to automatic processing of personal data are set out in annex A to the Government's White Paper on data protection (Cmnd 8539)

published in April 1982. The Data Protection Bill, taken as a whole, implements those provisions of the convention which require statutory expression. In particular, the provisions in the Bill establishing a register of data users and the office of data protection registrar, with powers to supervise and ensure compliance with the principles set out in schedule 1, give effect to the basic principles referred to in article 4 of the convention and set out in more detail in articles 5-8. (HC Debs., vol. 53, Written Answers, col. 399: 3 February 1984)

## **Part Two: I. *Sources of international law—treaties***

In reply to a question, the Prime Minister wrote of the arrangement made in January 1948 between the United States, Canada and the United Kingdom concerning the use of atomic weapons:

The so-called *modus vivendi*, signed by American, Canadian and British representatives in January 1948 was not a formal inter-governmental agreement and the arrangements it enshrined have almost all either become unnecessary or have been superseded by later agreements. It has, however, never been formally terminated.

(Ibid., vol. 52, Written Answers, col. 271: 19 January 1984)

In reply to the question whether the Gleneagles Agreement on sporting links with South Africa was a binding agreement, the Government spokesman, Lord Skelmersdale, said:

. . . the Gleneagles Agreement was a communiqué which was signed and reaffirmed . . . by all the Commonwealth Heads of Government.

(HL Debs., vol. 449, col. 627: 13 March 1984)

In reply to a question relating to the Yalta Protocols to the Helsinki Final Act, the Parliamentary Under-Secretary of State for the Armed Forces, Lord Trefgarne, stated in part:

The noble Lord is quite right to say that the Yalta Protocols were not a formal international agreement.

(Ibid., vol. 455, col. 978: 17 October 1984)

In the course of a statement on the subject of a draft agreement drawn up by the British and Chinese Governments on the future of Hong Kong, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, said:

. . . a draft agreement consisting of a joint declaration and three annexes was initialled on 26 September by the British ambassador in Peking and the Chinese Vice Minister of Foreign Affairs, Mr. Zhou Nan. It was published on the same day in a White Paper in London and Hong Kong and laid before the House.

I should like to draw the attention of the House to the following important features of the draft agreement. It constitutes a formal international agreement,

legally binding in all its parts. This is the highest form of commitment that can be given by one sovereign state to another.

(HC Debs., vol. 65, col. 819: 25 October 1984)

During a debate on the matter, the Secretary of State later remarked:

. . . the joint declaration and its annexes constitute a legally binding international agreement. As the Chinese Foreign Minister recently told the Standing Committee of the National People's Congress in Peking, the joint declaration is a form of international treaty; it has the same force in international law and is legally binding.

(Ibid., vol. 69, col. 391: 5 December 1984)

**Part Two: VIII.** *Sources of international law—restatement by formal processes of codification and progressive development*

(See also Part Eleven: II. A. 1., below)

In the course of a statement on 13 November 1984 in the Sixth Committee of the General Assembly deliberating upon the report of the International Law Commission, the United Kingdom representative, Sir John Freeland, turned to the Commission's study of the topic of State responsibility. He observed:

The progress so far has been steady, but it has been disappointingly slow, and this is not the first time on which that less than satisfactory state of affairs has called for comment. Clearly, the Commission is faced year after year with difficult choices over priorities, but it cannot be a source of satisfaction to anyone that the topic of State Responsibility has been under consideration by the Commission for 20 years, and under detailed consideration more than 10, without there being any clear assurance that the Commission is likely to complete the first reading of the entire set of draft Articles within a reasonably short time. Ultimately, and given the great importance of the subject of State Responsibility within the framework of the international legal system as a whole, such a state of affairs does not reflect credit on the codification process.

(Text provided by the Foreign and Commonwealth Office)

**Part Three: I. A. 1.** *Subjects of international law—States—international status—sovereignty and independence*

In the course of moving the second reading in the House of Lords of the Brunei and Maldives Bill, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated in part:

The purpose of the Brunei and Maldives Bill is to make minor amendments to certain United Kingdom enactments in order to take account of the recently acquired status of Brunei and the Maldives as members of the Commonwealth. It will have no effect on the laws of Brunei and the Maldives themselves.

The history of Britain's connections with these two countries is particularly interesting. The Sultanate of Brunei first entered into special treaty relations with the United Kingdom in 1846 and subsequently enjoyed the status of a protected

state until 1971. Even after 1971, the United Kingdom continued to exercise direct responsibility for Brunei's external relations until the last vestiges of the special treaty were removed by mutual consent on 31st December 1983. On that date, Brunei resumed her status as a sovereign and independent state and was admitted to the Commonwealth with effect from 1st January 1984.

Britain's connection with the Maldives dates back to the 18th century when, on taking possession of Ceylon, we extended our protection to the Maldives. In 1948 the Maldives were granted self-government, but the United Kingdom continued to maintain control of their external relations. In 1965 the Maldives became a fully independent sovereign state outside the Commonwealth, but was admitted to the Commonwealth, at its own request, as a special member in July 1982.

We are justly proud that Britain has been able to bring both Brunei and the Maldives to independence, and are pleased to welcome their admission to the Commonwealth, a process on which this Bill puts the seal. We are confident that we shall be able to build on our long-standing friendships with both countries.

I shall now briefly explain the provisions of the Bill. The amendments which it makes to United Kingdom enactments follow the precedents of the Papua New Guinea, Western Samoa and Nauru (Miscellaneous Provisions) Act 1980 and the New Hebrides Act 1980. These precedents relate to countries which, like Brunei and the Maldives, required only such legislative provision as was consequent upon their accession to membership of the Commonwealth. In the case of former British colonies the relevant independence Act, passed on the achievement of independence and almost simultaneous accession to the Commonwealth, includes these necessary amendments to other United Kingdom legislation which place the state on the same footing as other Commonwealth countries. However, both Brunei and the Maldives have achieved full sovereignty and membership of the Commonwealth without the need for such an independence Act.

(HL Debs., vol. 457, cols. 497-8: 20 November 1984)

**Part Three. I. A. 2. *Subjects of international law—States—international status—non-intervention and non-use of force***

(See also Part Three: I. A. 3., Part Three: I. E. (item of 12 October 1984), and Part Four: VII. (item of 28 November 1984), below)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

In the response to last year's Eastern bloc proposal for a non-aggression pact, North Atlantic Treaty Organisation Foreign Ministers stressed that respect for the obligation not to use force, enshrined in the United Nations charter and the Helsinki final act, is already mandatory and applicable between all states without exception.

(HC Debs., vol. 52, Written Answers, col. 598: 25 January 1984)

In reply to a question on the subject of the imprisonment in Turkey of Mr Mahmut Dikerdem, the Minister of State, Foreign and Commonwealth Office, wrote:

Mr. Mahmut Dikerdem was sentenced to a term of imprisonment on 14th November 1983 under the Turkish Penal Code. The sentence is now under

appeal. It is not our practice to intervene in individual cases in which citizens of another country have been tried under their own legal system.

(HL Debs., vol. 447, col. 648: 31 January 1984; see also *ibid.*, vol. 448, col. 847: 23 February 1984)

In reply to a question, the Parliamentary Under-Secretary of State for Armed Forces, Lord Trefgarne, stated:

... we have on many occasions made clear to the Iranian authorities our concern about violations of human rights. We co-sponsored the resolution on this question which was adopted by the United Nations Commission on Human Rights on 14th March. We avoid taking any action involving Iranian exiles which might be misconstrued as interference in the internal affairs of Iran.

(*Ibid.*, vol. 451, col. 797: 8 May 1984)

In the course of a debate in the House of Lords on the subject of judicial procedure in Zimbabwe, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... we must remember that Zimbabwe is an independent country. We played a part in the achievement of that independence and we naturally have a close interest in Zimbabwe's development, but it was clearly understood at the time that we have no other role. The application of the Zimbabwe constitution is a matter solely for the Zimbabwe Government and courts. We have no responsibility for Zimbabwe's affairs and no right to attempt to interfere. It is, nevertheless, right to express concern.

(*Ibid.*, vol. 452, col. 261: 23 May 1984)

In the course of a press release dated 19 October 1984 on the subject of three persons staging a 'sit-in' in the British consulate in Durban, the Foreign and Commonwealth Office stated:

It would ... be quite improper for us to intervene in the legal processes of South Africa, however much we may disapprove of them.

(Text provided by the Foreign and Commonwealth Office)

During a debate in the Security Council on the subject of apartheid on 13 December 1984, the Permanent Representative of the United Kingdom to the United Nations, Sir John Thomson, stated:

It does not lie within the competence of any organ of the United Nations to reject or declare null and void the constitution of a Member State. The seriousness of the situation in South Africa speaks for itself: we regret, and regard as counter-productive, the exaggerated language used in several parts of this resolution, including the term 'massacre', to describe that situation. In this respect, we regard the expression 'crime against humanity' as one of abhorrence rather than a technical legal description and we do not interpret any part of this resolution as falling within the terms of Chapter VII of the Charter.

(S/PV. 2560, p. 46)

**Part Three: I. A. 3.** *Subjects of international law—States—international status—domestic jurisdiction*

(See also Part Three: I. A. 2., above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We consider that the Eritrean question is an internal matter for Ethiopia, but we hope that a political and peaceful solution can be found that will bring an end to violence and ensure the observance of human rights, while taking account of the historic and cultural identity of Eritrea.

(HC Debs., vol. 56, Written Answers, col. 460: 21 March 1984)

In the course of a debate in the House of Lords on the subject of sovereignty in international law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

Revolutions and *coups* vary widely in character. In some cases a change of government through non-democratic means may be for the good, as the people of a country rise up against tyrannical rulers. In others, a small group seize by force what they could never have achieved by democratic means, and proceed to deny their own people what we would regard as elementary rights. In either case, there may be an offence against the previous constitutional order of the state concerned. But there is not thereby necessarily any offence against international law.

(HL Debs., vol. 448, col. 343: 15 February 1984)

In reply to a question on the subject of Her Majesty's Government's attitude towards Turkish incursions into Iraqi territory, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We understand that the Turkish operations were conducted in hot pursuit of armed groups which had been responsible for the recent deaths of at least 18 members of the Turkish armed forces. As the Turks have acted with the prior agreement and approval of the Iraqi Government, we do not think there are any grounds on which we can intervene in what is essentially an agreed policy of two sovereign states.

(HC Debs., vol. 67, Written Answers, col. 388: 16 November 1984)

**Part Three: I. B. 1.** *Subjects of international law—States—recognition—recognition of States*

(See also Part Eight: II. C. (certificate of 17 September 1984), below)

In the course of a debate in the House of Lords on the subject of sovereignty in international law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

The criteria which the Government normally apply to the recognition of a state are that it should have, and seem likely to continue to have, a clearly defined

territory—with a population, and a government which is able of itself to exercise effective control of that territory, full internal autonomy, and independence in its external relations.

There are, however, exceptional cases where other factors—including relevant United Nations resolutions—may have to be taken into account. My noble friend Lord Home of the Hirsel mentioned the special difficulties faced by smaller states which do not have the traditional means to maintain and defend their sovereignty.

(HL Debs., vol. 448, col. 341: 15 February 1984)

Baroness Young added:

In some quarters membership of the United Nations has come to be seen as setting the final seal of approval on a country's independence. This is in fact a little wide of the mark. The United Nations Charter provides that membership of the organisation is open to all peace-loving states which accept the obligations contained in the Charter and, in the judgement of the organisation, are able and willing to carry out these obligations. In practice the admission of states to membership is effected more or less automatically by a decision of the General Assembly on the recommendation of the Security Council.

Membership is not, of course, obligatory. Switzerland, for instance, has not sought it. And one or two of the smaller newly independent states have decided that the financial costs of full membership outweigh the benefits. But most have chosen to foster their relations with other countries by taking their place in this international forum. The consequent growth in the number of states joining the United Nations has been welcomed by successive British Governments.

(Ibid., col. 342)

The Minister stated later in her speech:

We have reconsidered the basis upon which we have dealings with governments which have achieved power through force. However, we cannot go further and reconsider our acceptance of the state concerned. Once a country is accepted as a state, it continues as such whether the government are changed by parliamentary elections or by revolution, just as it continues in being when there is neither revolution nor true elections but dictatorship or party despotism. The numerous ties between the state concerned and its people and other states and theirs survive any change of government. There can be no question of somehow expelling the state from the society of nations, any more than of severing the more personal ties.

(Ibid., col. 345)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

As stated by my right hon. and noble Friend, the then Foreign Secretary in another place on 28 April 1980, when there is a change of Government we

'decide the nature of our dealings with the new regime in the light of the Government's assessment of whether they are able of themselves to exercise effective control in the territory of the state concerned and seem likely to continue to do so.'

This change of practice did not affect the separate question of the recognition of states. The criteria which normally apply for the recognition of a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are able of themselves to exercise effective control of that territory and independence in their external relations. There are, however, exceptional cases when other factors, including relevant United Nations resolutions, may have to be taken into account.

(HC Debs., vol. 55, Written Answers, col. 226: 29 February 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We continue to recognise only one Cypriot state: the Republic of Cyprus under the Government of President Kyprianou.

(Ibid., vol. 68, Written Answers, col. 452: 27 November 1984; see also Part Three: I. B. 5. (Written Answers of 15 November 1983 and 15 March 1984), below)

**Part Three: I. B. 2. *Subjects of international law—States—recognition—recognition of governments***

(See also Part Three: I. B. 5., and Part Five: IV. (Written Answer of 3 May 1984), below)

On 1 February 1984, the Secretary of State, Foreign and Commonwealth Office, Sir Geoffrey Howe, gave evidence to the Foreign Affairs Committee of the House of Commons which was investigating the recent events in Grenada. Asked what formal recognition has Her Majesty's Government given to the interim administration appointed by Sir Paul Scoon, the Secretary of State replied:

We do not, in fact, any longer recognise governments; we recognise States. . . . I remember spending a great deal of time learning international law about the importance of recognising governments, so I was relieved when I found our policy had changed on this.

(*Parliamentary Papers*, 1983-4, HC, Paper 226, p. 14)

In the course of a debate in the House of Lords on the subject of sovereignty in international law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

Whenever a *coup* or revolution occurs in a state, the British Government must consider their own future relations with the government of the state concerned. This was a point raised by many noble Lords. The state continues to exist, of course, as do ties between its people and the British, which may include family and friendship links as well as those of culture and history. We have to remember that it is only the leadership which has changed: and that the circumstances are often confused and the facts slow to emerge.

Against this background, I should perhaps now explain briefly the Government's approach to the question of relations with revolutionary régimes. Until 1980 it had been the consistent practice of successive British Governments to

decide the question of recognising a new régime according to whether it commanded the obedience of the mass of the population and whether it controlled the greater part of the state's territory . . . These criteria became well known to Parliament as different countries' changes of régime were debated. Nevertheless, their application often proved difficult in practice. Some revolutionary régimes, for instance, commanded the obedience of the people but not their willing support. Obedience had been obtained by threats. Popular sentiment was suppressed, and individual dissent not tolerated. The view was taken, however, that, if the criteria were satisfied, the British Government of the day should recognise the new régime.

Sometimes this practice was misunderstood and, despite explanations to the contrary, our act of recognition was taken to imply approval. This was particularly unfortunate in cases where there was legitimate public concern about the violation of human rights by the new régime or the manner in which it had taken power, perhaps from an elected Government. Each change of régime by means other than elections, and each *coup* or revolution—and those were many, of course—thus brought us face to face with an awkward and public dilemma. It also created a minor—and rather artificial—crisis in our relations with other countries precisely at the time when the protection of our interests required a relationship both calm and pragmatic.

It was for these reasons that in 1980 the noble Lord, Lord Carrington, announced a change in practice. In his statement of 28th April 1980, he announced that the Government had decided to cease recognising other governments. Today when there is a revolution, we simply—and I quote: 'decide the nature of our dealings with the new régime in the light of the Government's assessment of whether they are able of themselves to exercise effective control in the territory of the state concerned and seem likely to continue to do so'.

(HL Debs., vol. 448, cols. 343–4: 15 February 1984; see also UKMIL 1980, p. 367)

In the course of a reply to a question about British citizens held in Angola by UNITA forces, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

A Unita representative today discussed the position with a Foreign and Commonwealth Office official and we hope to get an authoritative reaction very soon. . . . I should like to make it quite clear that the contact with Unita is not a recognition of Unita. The contact is purely on humanitarian grounds. It follows our standard practice in these situations.

(Ibid., vol. 450, col. 608: 3 April 1984)

In reply to the question whether Her Majesty's Government will recognize the Polisario Front as the legitimate representative of the Western Sahara, the Minister of State, Foreign and Commonwealth Office, wrote:

No. It is not our practice to accord recognition to movements such as the

Polisario Front, and to do so in this case would be inconsistent with our policy of neutrality on the Western Sahara dispute.

(HC Debs., vol. 54, Written Answers, col. 563: 22 February 1984; see also *ibid.*, vol. 58, Written Answers, col. 503: 25 April 1984)

**Part Three: I. B. 5. *Subjects of international law—States—recognition—non-recognition***

(See also Part Three: I. B. 2., above and Part Eight: II. A. (item of 11 May 1984), below)

In the course of a statement in the House of Commons on the subject of the decision of the Turkish community in Cyprus to issue a unilateral declaration of independence, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

The position is that this morning the body calling itself the Assembly in northern Cyprus passed a resolution approving the establishment of a Turkish Republic of North Cyprus and a declaration of independence. Her Majesty's Government deplore this action by the Turkish Cypriot community, which amounts to a declaration of secession. We have issued a statement which makes it clear that it is incompatible with the 1960 treaties.

Our position has always been that we recognise only one Republic of Cyprus. That remains the position today. In our view, this latest move cannot be seen as altering the status of the Turkish Cypriot community.

(*Ibid.*, vol. 48, col. 725: 15 November 1983; see also Written Answer of 15 March 1984, below)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote that Her Majesty's Government had no plans to recognize Eritrea.

(*Ibid.*, vol. 53, Written Answers, col. 558: 7 February 1984)

In reply to a question during a debate in the House of Lords on the subject of sovereignty in international law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

Successive British Governments, while recognising *de facto* the incorporation of the Baltic States into the Soviet Union, have not recognised this incorporation *de jure*. There has been no change in this policy.

(HL Debs., vol. 448, col. 345: 15 February 1984)

In reply to a question about South Africa, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Our policy is to have contact with politicians and officials of the non-independent homelands, though not with those from the so-called 'independent' homelands which we do not recognise.

(HC Debs., vol. 54, Written Answers, col. 344: 17 February 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We do not recognise North Korea as a state and have no diplomatic relations with any authorities there.

(*Ibid.*, col. 476: 21 February 1984; see also *ibid.*, vol. 65, Written Answers, col. 758: 26 October 1984, and Written Answer of 16 November 1984, below)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

Entities which the Government do not recognise as states include North Korea, Taiwan, the so-called South African Homelands of Transkei, Ciskei, Bophuthatswana and Venda, Northern Cyprus and the Western Sahara.

(*Ibid.*, vol. 55, Written Answers, col. 226: 29 February 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We do not recognize the so-called Turkish Republic of Northern Cyprus and have no diplomats accredited to it. However, the High Commission in Nicosia, which is accredited to the Republic of Cyprus, has informal contacts with the Turkish Cypriots, which provide for the protection of British interests in northern Cyprus.

(*Ibid.*, vol. 56, Written Answers, col. 178: 13 March 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Department of Transport, wrote:

As my right hon. and learned Friend the Secretary of State for Foreign and Commonwealth Affairs told the House on 15 November 1983, at column 725, we do not recognise the so-called 'Turkish Republic of Northern Cyprus'. British airlines that wish to land in Cyprus require permission from the Cyprus Air Transport Licensing Authority. It is contrary to the laws of the Republic of Cyprus for airlines to serve or to make technical landings at points in northern Cyprus.

(*Ibid.*, col. 221: 15 March 1984)

In reply to questions, the Minister of State and the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, respectively wrote:

We recognise the Ukrainian Soviet Socialist Republic as a constituent republic of the Union of Soviet Socialist Republics.

The Ukraine's election to the Security Council in no way affects our attitude to the Ukrainian Soviet Socialist Republic and does not imply recognition of it as an independent state.

(*Ibid.*, vol. 57, Written Answers, col. 576: 4 April 1984)

In the course of a debate held on 11 May 1984 in the Security Council, the United Kingdom Permanent Representative, Sir John Thomson, said on the subject of Cyprus:

My delegation was the author and sponsor of resolution 541 (1983). That resolution stated in unambiguous terms that the declaration by the Turkish Cypriot authorities issued on 19 November 1983 purporting to create an independent State in northern Cyprus was incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee. The resolution considered that the declaration was legally invalid and would contribute to a worsening of the situation in Cyprus. I think perhaps we could all agree that we were right in coming to that judgement. The resolution also called upon all States and the two communities in Cyprus to refrain from any action which might exacerbate the situation.

(S/PV. 2538, p. 22)

The Council should state its position firmly and persuasively while avoiding actions which would make a settlement more difficult. In our view it can best do this on the basis of certain fundamental principles which are not disputed by either of the parties and have the backing of the international community as a whole. These are: support for the independence, sovereignty, territorial integrity and non-alignment of the Republic of Cyprus; opposition to and non-recognition of the Union of the Republic of Cyprus in whole or in part with any other country and/or any form of partition or secession, including the unilateral declaration of independence, by any part of the Republic; support for an independent, non-aligned, bicomunal, federal Republic of Cyprus in accordance with the provisions of the 1977 and 1979 high-level agreements; support for the continuation of the Secretary-General's mission of good offices, as authorized in paragraph 6 of Security Council resolution 367 (1975), with the objective of promoting, through the resumption of negotiations and in accordance with the above principles, a peaceful, just and lasting solution to the Cyprus problem; belief that the main impetus must come from the parties, which should be in no doubts of the urgency of the task; and opposition to any action by anyone which might jeopardize the outcome of negotiations or increase tension in Cyprus.

(Ibid., pp. 24-6)

In reply to the question why the United Kingdom does not recognize North Korea as a State, the Minister of State, Foreign and Commonwealth Office, wrote:

There are exceptional circumstances in Korea, arising in part from the involvement of the United Nations in the Korean question, which leads this Government, along with all previous Governments, to the view that recognition of North Korea as a state would not be appropriate.

(HC Debs., vol. 67, Written Answers, col. 388: 16 November 1984)

**Part Three: I. C. 4. *Subjects of international law—States—types of States—dependent States and territories***

(See also Part Three: I. A. 1., above, and Part Three: I. E., Part Four: VII. (Written Answers of 16 February and 6 March 1984), Part Eight: II. A., and Part Nine: X. (item of 22 March 1984), below)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

There have been no recent discussions in the institutions of the European Community regarding the position of Jersey, Guernsey and the Isle of Man in relation to the Community Treaties. The position of these islands continues to be governed by articles 25–27 of the Act of Accession and by protocol 3 to that Act. (Ibid., vol. 52, Written Answers, col. 56: 16 January 1984)

In reply to a further question, the Minister of State, Home Office, wrote:

For the purposes of the British Nationality Act 1981, the Channel Islands and the Isle of Man are treated as part of the United Kingdom. Persons closely connected with the islands have therefore precisely the same eligibility for British citizenship as if their connection had been with the United Kingdom.

(Ibid., col. 68)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The following dependent territories are associated with the European Community under part IV of the treaty of Rome as amended.

*France*

- French Polynesia
- French Southern and Antarctic Territories
- New Caledonia and Dependencies
- Wallis and Futuna Islands

*Netherlands*

- Netherlands Antilles (Aruba, Bonaire, Curacao; St. Martin, Saba, St. Eustatius)

*United Kingdom*

- Anguilla
- Bermuda
- British Antarctic Territory
- British Indian Ocean Territory
- British Virgin Islands
- Cayman Islands
- Falkland Islands
- Falkland Islands Dependencies
- Montserrat
- Pitcairn
- St. Helena and Dependencies
- Turks and Caicos Islands

Mayotte, a 'territorial collectivity of the French Republic', is also associated with the Community under part IV of the treaty.

Gibraltar is a part of the European Community and the provisions of the treaty of Rome, with some exceptions, apply to it. Certain provisions of Community law also apply to the Channel Islands and the Isle of Man.

The dependent territories are represented in the European Community Council of Ministers by the relevant functional Minister of the member state of which they are a dependency.

(HC Debs., vol. 52, Written Answers, col. 233: 19 January 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Home Office, wrote in part:

As the state party to the European Convention on Human Rights as regards the bailiwick of Guernsey, the United Kingdom handles petitions to the European Commission alleging breaches of the convention by the Guernsey authorities. The Foreign and Commonwealth Office is responsible for the conduct of such cases at Strasbourg and officials of the Department act in a liaison capacity between the Guernsey authorities and the Foreign and Commonwealth Office.

(Ibid., col. 236)

In reply to a question, the Prime Minister wrote:

Her Majesty's Government retain responsibility for the defence of the Channel Islands and the Isle of Man and for their external relations, including those with the United Kingdom. The Ministry of Defence and the Foreign and Commonwealth Office, respectively, have general responsibility for these matters, and other Departments are involved when a subject raises their particular responsibility.

(Ibid., col. 272)

In reply to a question on the application of Article 73 of the United Nations Charter to the Falkland Islands, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

As the member of the United Nations responsible for the administration of the Falkland Islands, we shall continue to fulfil our obligations under Article 73 of the Charter.

(Ibid., vol. 54, Written Answers, col. 35: 13 February 1984)

In reply to the question which territories of the European Community other than Gibraltar have no representation in the European Assembly, the Minister of State, Foreign and Commonwealth Office, wrote:

There are none. The European territories of other member states are an integral part of those member states and take part in both national elections and elections to the European Parliament. Gibraltar, as a dependent territory, is not an integral part of the United Kingdom and therefore participates in neither national nor European elections.

(Ibid., col. 130: 14 February 1984)

In reply to a question about Montserrat's role in the Grenada invasion, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Details are available in the memorandum dated 17 February 1984 submitted by the Foreign and Commonwealth Office to the Select Committee on Foreign Affairs and published by the Committee as Appendix 1 to its report on Grenada—HC 226 of 5 April 1984.

Under the terms of the treaty of the Organisation of Eastern Caribbean States—OECS—Montserrat, as a dependent territory, is excluded from deliberations on matters relating to defence and external affairs.

The Executive Council of Montserrat asked on 25 October 1983, after the start of the intervention in Grenada, for our approval to send a small contingent of volunteers from the Montserrat defence force to Grenada. [The Secretary of State for Foreign and Commonwealth Affairs] was unable to approve this request because it was not in accord with our policy at the time, because the status of members of the force operating outside Montserrat would have been very questionable in both local and international law, and because the force is neither properly trained nor equipped for such operations.

(Ibid., vol. 58, Written Answers, col. 499: 25 April 1984)

In their *amici curiae* Brief filed in October 1984 in litigation before the Supreme Court of the United States (for a summary of the facts of this litigation, see UKMIL 1983, p. 515), the Governments of the United Kingdom and the Cayman Islands stated:

Cayman is a dependent territory of the United Kingdom for whose external relations and vital interests the United Kingdom is responsible. The United Kingdom is concerned that the banking and off-shore finance business of Cayman be conducted with full regard to Cayman's duty to the international community and, in particular, to the United States, to prevent the use of off-shore banking facilities by criminals engaged in money-laundering operations and to take all practicable measures for the prevention of abuse of drugs. To that end, Cayman legislation is examined closely and critically and is subject to the approval of the United Kingdom.

(Supreme Court of the United States: *In re Grand Jury Proceedings the Bank of Nova Scotia; The Bank of Nova Scotia v. United States of America*, Brief of the United Kingdom and the Cayman Islands as *amici curiae*, p. 7)

During a debate in the Security Council on 31 October 1984 on the subject of the Falkland Islands, the Permanent Representative of the United Kingdom to the United Nations, Sir John Thomson, remarked:

Another irrelevancy by the Foreign Minister of Argentina was his reference to South Georgia and the South Sandwich Islands. He spoke as if they were part and parcel of this agenda item. They are not. The two Dependencies are geographically, legally and historically distinct from the Falkland Islands, and the arguments on which Argentina bases its claims to sovereignty over the Falklands have no application to them. Argentina made no claim to South Georgia until 1927 and no specific claim to the South Sandwich Islands until 1948. Those islands are simply administered from the Falklands for administrative convenience.

(A/39/PV. 45, pp. 53-5)

In the course of a statement made on 8 November 1984 in the Fourth Committee of the General Assembly of the United Nations on the topic of decolonization, the United Kingdom representative, Mr P. Maxey, remarked:

... the annual debate under item 18 provides us with an opportunity to reflect on the process of decolonisation. The figures I think speak for themselves: since the start of the decade a further seven former non-self-governing territories, all of them either wholly or partly administered by the United Kingdom, have achieved independence and joined the United Nations. The latest of them to do so was of course Brunei Darussalam which we welcomed by acclamation to the United Nations at the start of this session of the General Assembly. May I say again how pleased we are to see their representatives with us today.

Mr Chairman, there is cause for great satisfaction in the political evolution of these seven territories. There is perhaps even greater cause for satisfaction that their independence was in the great majority of cases achieved peacefully and in all cases by constitutional means. Their experience provides a demonstration of the principle of self-determination at work: in no case was independence forced on the people. But by the same token the United Kingdom did not stand in the way of independence when it became clear that this was the desired goal of the people.

Mr Chairman, the decolonisation process is quite obviously proceeding successfully and swiftly. When the first list of non-self-governing territories was drawn up in 1946, 43 of them were under British administration. This total has now dwindled to 10, though even this number is not an entirely accurate reflection of the pace of decolonisation since many of the territories which remain on the List were previously part of larger units, such as the Leeward Islands.

The territories that remain have all expressed a wish to maintain their constitutional links with Britain for the foreseeable future: they are five small island territories in the Caribbean: the British Virgin Islands, the Cayman Islands, Montserrat, Turks & Caicos Islands and Anguilla; two in the South Atlantic: St Helena and the Falkland Islands, one in the Pacific: Pitcairn Island; and of course Gibraltar. Members of the Special Committee on Decolonisation will already be familiar with these territories. Each year we submit information on them to the UN Secretariat as we are required to do under Article 73(e) of the UN Charter. We also supplement this information with statements to the Special Committee.

We take our obligations under Article 73 of the Charter very seriously as we do our task of cooperating with the Committee of 24. That is not to say we agree with the Committee on all counts: the language on military activities in this year's draft resolution on Bermuda for example causes us disquiet. And the wholly inappropriate reference to Ascension Island in the draft decision on St Helena both last year and now again this, is a matter of considerable regret to us. But such differences should not detract from what I hope our colleagues on the Committee of 24 would agree is a constructive and collaborative relationship. That relationship has evolved over many years and it is our intention to sustain and nurture it. But the task is of course made considerably easier if all concerned can avoid exaggerated rhetoric and the language of denunciation; and if they can in particular resist the temptation to insert into the various texts on non-self-governing territories polemical language that owes more to ideological preconceptions

and political animosities than to concern for the real problems of dependent peoples.

Were all our territories the same there would of course be no need to make more than a ritual proforma statement each year. But in reality they are of course very different and it is this difference that we seek to bring to the Committee's attention. The aspirations of the inhabitants of Bermuda are for example very different from those of Pitcairn. The point we have tried to convey to the Committee of 24 and the Fourth Committee is that there is no single model for decolonisation. Independence though a desirable end product of constitutional advance for many of our dependent territories may not appear so to the inhabitants of others. There can be no blue print for economic and political development in British dependent territories because each one must be allowed to follow its own freely chosen and individual path. We see our role as the administering power to be to encourage the local people along whatever path they themselves have chosen. We stand ready to advise and to give guidance and assistance when this is required. But we do not and shall not seek to chart a particular course in advance and insist that it be followed. We believe such a process would not only be counterproductive, it would also conflict with our aim of encouraging full internal self-government in our dependent territories. In short we recognise that it is not for outsiders to dictate what is in the best interests of a non-self-governing territory. That must always be for the people themselves to decide.

Mr Chairman, I mentioned earlier the seriousness with which we approach our obligations under Article 73 of the UN Charter. May I briefly remind the Committee what these are? The requirement under Article 73(e) to submit annual reports on our dependent territories is of course well known to this Committee. But other parts of Article 73 are equally important. The preamble for example talks in unambiguous terms about the interests of the inhabitants of non-self-governing territories being 'paramount'. It also requires that administering powers accept 'as a sacred trust' the obligation to promote the well-being of the inhabitants of these territories. The Committee will note the phrase 'sacred trust'. There can be few international covenants or agreements where the requirements are set out in such binding terms!

There are a number of specific areas where Article 73 imposes obligations on administering powers: the first and arguably the most important is concerned with the political, economic, social and educational advancement of dependent peoples, 'their just treatment and their protection against abuses'. And this 'with due respect for the culture of the peoples concerned'. This is a detailed and comprehensive undertaking that is not always easy to fulfil. But I believe without being complacent, that we have generally managed to combine respect for the culture of the dependent peoples for whom we are responsible with promotion of their political and social advancement. I should like to think too that we have stood up for our dependent territories to ensure their 'just treatment and protection against abuses' when this was necessary. We have recently had occasion in the General Assembly to debate one particular instance two years ago when my government came to understand only too well what 'abuse' of a non-self-governing people could mean.

Mr Chairman, administering powers are also obliged to 'develop self-government', taking account of the political aspirations of the people concerned

and to help them develop free political institutions in accordance with the particular circumstances of each territory. We take particular pride in our record in this area, Mr Chairman. The working papers prepared by the UN Secretariat for the Committee of 24 on our territories indicate just how varied are the political institutions in our dependent territories, ranging from the highly developed political system in Bermuda which dates back over 350 years to the small Pacific island of Pitcairn that I mentioned earlier where an island community of under 50 people has had to develop its own particular, but no less legitimate, form of democracy.

Mr Chairman, I have devoted some time to setting out the requirements of Article 73 of the UN Charter because it is the Charter that provides the only yardstick against which our conduct as an administering power can be measured. I am pleased to say that successive UN visiting Missions to United Kingdom dependent territories have concluded that while economic and social problems still remain to be solved (as of course they do in many independent sovereign nations) we have by and large fulfilled our obligations well.

I might conclude by mentioning the successful visit this year to Anguilla by a UN visiting mission whose report has recently been endorsed by the Committee of 24 and which the Fourth Committee itself will next week be asked to approve. The chairman of the Visiting Mission, the distinguished representative of Tunisia, spoke eloquently and succinctly about the visit in a statement earlier this week. And I take this opportunity of thanking him most warmly for his gracious expressions of gratitude to my government and the government of Anguilla. We agree the visit went well. It was a valuable educative experience for Anguillans and I expect for the Mission members too. We have already spoken at some length on the Mission's report in the Committee of 24 so there is no need for me to set out our position in detail here. Suffice it to say that we are in broad agreement with most of the Mission's conclusions and recommendations and will do what we can to see they are implemented.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question on the status of the Channel Islands and the Isle of Man, the Minister of State, Home Office, wrote:

The islands are internally self-governing dependencies of the Crown. The United Kingdom Government are directly responsible for their external relations and defence. The Crown acts through the Privy Council. [The Secretary of State for the Home Department] is the Privy Councillor with primary responsibility for matters relating to the islands. He acts as the channel of communication between the islands and the United Kingdom Government, and submits advice as appropriate, with respect principally to proposals for legislation (which require Royal Assent) and Crown appointments.

(HC Debs., vol. 67, Written Answers, col. 203: 13 November 1984)

**Part Three: I. E. *Subjects of international law—States—self determination***

(See also Part Three: III. D. (item of 12 October 1984), below)

In reply to an oral question, the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, stated in part:

This and previous British Governments have at the United Nations supported East Timor's right to self-determination, and I am glad to reaffirm that.

(Ibid., vol. 52, col. 901: 25 January 1984)

In the course of replying to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

We . . . have given full support to successive United Nations resolutions on Afghanistan calling for the immediate withdrawal of foreign troops, preservation of Afghanistan's independence and non-aligned status, self-determination for the Afghan people and the return of the refugees in safety and honour.

(Ibid., vol. 60, Written Answers, col. 610: 25 May 1984)

On 20 June 1984, the Foreign Affairs Committee of the House of Commons heard evidence from Baroness Young, Minister of State, Foreign and Commonwealth Office on the subject of the Falkland Islands. Asked about the meaning of the word 'paramount' in Article 73 of the Charter of the United Nations, she replied:

May I say further on the subject of the word 'paramount' that the fact is that it is Parliament that exercises paramount authority and that I think it is inconceivable that Parliament would take a decision on sovereignty over the Falkland Islands against the wishes of the Falkland Islanders. The Foreign and Commonwealth Office are, of course, as aware of this as anyone else. As I understand it, however, it is the interests and not the wishes of the people which are paramount in Article 73 of the Charter of the United Nations.<sup>1</sup>

The Minister later added the following footnote:

<sup>1</sup> *Note by Witness*: 'At the same time it is clear that the application of the right of peoples to self-determination, recognised in Article 1 (2) of the Charter and other important international instruments, requires a free and genuine expression of the will of the peoples concerned.'

(*Parliamentary Papers*, 1983-4, HC, Paper 268-viii, p. 135)

In the course of a statement in the Third Committee of the General Assembly of the United Nations on 12 October 1984 on the subject of the importance of the universal realization of the right of peoples to self-determination, the United Kingdom representative, Mr R. Fursland, observed:

The issues of racism and self-determination are related. It is right that we discuss them together. The South African system is particularly obnoxious because racism is institutionalised in the apartheid system; and because the majority of South Africa's people are denied any effective role in running the society in which they live. That is, they are denied the right of self-determination.

The right of self-determination has pride of place in both International Covenants, and rightly so. It is not only important in itself, but a necessary foundation for the exercise of other human rights.

One might get the impression from some UN debates that the right of self-determination can only be denied from outside, by invasion and foreign

occupation. And indeed, the occupation and brutalisation of peoples by foreign invaders—in, for example, Afghanistan and Cambodia—represent glaring contemporary violations of this right.

But we must not forget that peoples can also be deprived of this right by their own countrymen. The fact that Amin was a Ugandan did not mean that the people of Uganda suffered any the less under his dictatorship. The fact that Pol Pot was a Cambodian did not mean that the people of Cambodia suffered any the less under his dictatorship.

It cannot be reiterated too often that, according to the International Covenants, self-determination is a right which belongs to peoples, not to governments. The fact that a country is not occupied by a foreign power does not automatically mean that its people enjoy the right of self-determination. They enjoy that right only if, in the words of the Covenants, they are enabled to 'freely determine their political status and freely pursue their economic, social and cultural development'.

Self-determination is not a one-off exercise. It cannot be achieved for any people by one revolution or one election. It is a continuous process. It requires that peoples be given continuing opportunities to choose their governments and social systems, and to change them when they so choose. This in turn requires that they should be enabled to exercise other rights set out in the Covenants, such as the rights to freedom of thought and expression; the rights of peaceful assembly and freedom of association; the right to take part in the conduct of public affairs, either directly or through freely chosen representatives; and the right to vote and be elected at genuine periodic elections.

Many peoples today are deprived of the right of self-determination, by elites of their own countrymen and women: through the concentration of power in a particular political party, in a particular ethnic or religious group, or in a certain social class. These oligarchies maintain their dictatorship by imposing their own ideologies on the country as a whole; by refusing to seek a genuine popular mandate from their people; and by denying their peoples the opportunity to practise and profess different beliefs. Such systems are generally characterised by oppression and inequality, and sometimes by more violent abuses such as torture, summary executions and disappearances.

My delegation considers that all peoples are entitled to expect the United Nations to protect their right of self-determination, from abuse by their own countrymen as well as outsiders. In this connection, I should like to draw the Committee's attention to a document circulated under this item, namely document A/39/307, which contains the Declaration on Democratic Values issued at the London Economic Summit held from 7–9 June this year. Among other things, this Declaration stipulates a belief in the rule of law which respects and protects without fear and favour the rights and liberties of every citizen, and provides the setting in which the human spirit can develop in freedom and diversity; a belief in a system of democracy which ensures genuine choice in elections freely held, free expression of opinion and the capacity to respond and adapt to change in all its aspects; and a belief that, within a democratic system, governments should set conditions designed to combine the greatest possible range and freedom of choice and personal initiative with the pursuit of the ideals of social justice, obligations and rights.

We believe that such a system represents the best guarantee to our people of

their right to self-determination, and to other rights set out in the Universal Declaration and International Covenants. These are the principles which we have sought to establish in our own society, and which it will be our objective to promote and protect throughout this session of the Third Committee.

However, Mr Chairman, the fact that self-determination has a wider meaning does not mean that foreign invasion and occupation are any the less appalling violations of the UN Charter, as well as the International Covenants and other international instruments.

It is a tragedy and a scandal that the Afghan people continue to be denied their right of self-determination by continued Soviet occupation. We are told that the people of Afghanistan requested 'fraternal assistance', and that Afghanistan is now 'under control'. If so, why has it been necessary to station in Afghanistan for the past four and a half years a Soviet garrison larger than the population of some UN Member States? Why, indeed, has the garrison been steadily increased to well over a hundred thousand? Why has heavy fighting continued in the North, South and West of Afghanistan, and even in Kabul and its surrounds? And why have fully a fifth of the Afghan people—well over three million—decided that the situation in their country is so appalling that they have fled and found refuge elsewhere? These millions of refugees know that their country is the victim of foreign aggression. So do the Afghan people who have chosen to remain and fight with extraordinary courage to resist the aggressor and regain their former independence and non-aligned status. This is a classic example of a struggle for national liberation, which can only be resolved by the withdrawal of all Soviet forces.

Much the same is true of the Vietnamese occupation of another independent non-aligned state, Cambodia. The United Kingdom holds no brief for the previous Cambodian regime. Indeed it was the UK which took a lead at the Human Rights Commission in 1978 and 1979 in sponsoring draft resolutions about the atrocious human rights violations under Pol Pot. Sadly, these draft resolutions failed, because of opposition from the Soviet Union and others. The Commission's silence about the horrific suffering of the Cambodian people at that time remains a permanent blot on its record. But the fact that this body, the United Nations, failed to help the Cambodian people during their suffering under one regime does not mean that we should acquiesce in a perpetuation of their suffering under that terrible regime's terrible and alien-dominated successor.

I make no apology for quoting again a note (E/CN 4/Sub 2/1982/L.4) prepared in 1982 for the Commission on Human Rights. This note concluded that: 'It seems that both of the alleged reasons for the Vietnamese intervention have disappeared and that therefore immediate withdrawal can be demanded. Otherwise there will be reason to assume the Government of Vietnam does, in fact, intend to prevent or dominate the exercise of the right to self-determination of the Kampuchean people.' That note was written two years ago. The Vietnamese army remains in occupation of Cambodia. There can now be no doubt about Vietnamese determination to deprive the Cambodian people of their right of self-determination.

After referring to the situation in Namibia (see Part Three: III. D. (item of 12 October 1984), below), Mr Fursland continued:

Respect for the right to self-determination is also fundamental to resolving the

problems of the Middle East. The people of Israel should be uniquely equipped to understand aspirations to self-determination, and especially able to recognise the parallel insistence of the Palestinian people. In practice, certain actions taken by Israel over the last year have led to further deterioration in the confidence of the Arab inhabitants of the West Bank and Gaza. We hope that the new Government of Israel will take steps to reverse this trend, and that the Palestinians will also play their part in improving the climate of confidence. This represents the only hope of achieving a balanced peace settlement embracing both Israel's right to existence and security and the Palestinian right of self-determination.

Mr Chairman, the right of self-determination applies with equal force to the peoples of Namibia, of the Middle East, of Afghanistan and Cambodia. It applies to the people of Brunei Darussalam, which we were delighted to welcome to the United Nations earlier this session. It applies, as the United Nations has consistently recognised, to the 569 people in the Cocos Keeling Islands and the 5,000 on Saint Helena. It applied to all people, without discrimination, including the 1800 Falkland Islanders. The United Kingdom will be addressing this last issue in more detail in Plenary, under Item 26 of the Assembly's agenda.

Mr Chairman, the principle of self-determination is both inalienable and indivisible. It is fundamental to international peace and security, and to the protection of national integrity. As nation states, all of us have a vital interest in it. We cannot afford to be selective in its application, because none of us—except perhaps the very strongest—can be sure when our own right of self-determination may be threatened.

(Text provided by the Foreign and Commonwealth Office)

During a debate in the Security Council on 31 October 1984 on the subject of the Falkland Islands, the Permanent Representative of the United Kingdom to the United Nations, Sir John Thomson, remarked:

Having dealt with those unjustified attacks on us, I come back to the real subject of this debate—that is, Argentina's insistence on sovereignty and its omission of self-determination. My Government opposes the draft resolution because, *inter alia*, while it would seek to give the impression of neutrality on the question of sovereignty, the Argentine Government has repeatedly made it absolutely clear that only one outcome could be acceptable to it: the transfer of sovereignty over the Falkland Islands to Argentina, irrespective of the wishes of the inhabitants.

...

The draft resolution is objectionable to us also because it fails to pay any heed to something we are obliged by the United Nations Charter to protect, namely, the fundamental rights of the Falkland Islanders. We are all familiar with the Charter doctrine about self-determination; indeed, by our count, no fewer than 101 of the 145 speeches in the general debate this year referred directly to self-determination. It is a principle which the great majority of Governments regularly invoke. We say with conviction that the people of the Falkland Islands have the same right to self-determination. Moreover, the islanders' right to self-determination is no less inalienable than that of other peoples. No one can take it away from them.

...

Of course, we heard that Argentina would provide guarantees for the status of the inhabitants. But such guarantees would self-evidently be unnecessary if the principle of self-determination was accorded to the Falkland Islanders. The notion of guarantees presupposes that it is for others to decide where the interests of the Falkland Islanders lie.

Surely there is no people which is prepared, towards the end of the twentieth century, to agree that its interests should be determined by foreigners. One wonders as to the propriety of this argument, especially in the Fourth Committee, which so frequently adopts resolutions on Non-Self-Governing Territories reaffirming the inalienable right to self-determination and independence of non-self-governing peoples. One wonders also as to the propriety of an argument that holds that inalienable rights can be given or, still more, taken away.

(A/39/PV. 45, pp. 56-60 *passim*)

Continuing the debate on 1 November 1984, Sir John Thomson stated in the course of his final reply:

By insinuating that the wishes of the population of the Falkland Islands may be open to negotiation, [the draft resolution] pays scant regard to the principles of the United Nations Charter or to the Falkland Islanders' right of self-determination.

I shall quote again briefly from the remarks of my Secretary of State in the general debate. He said:

'Those who call on us to negotiate on the sovereignty of the islands should think what exactly it is they are asking us to do. For Argentina, such negotiations could only have one outcome: the transfer of sovereignty over the islands irrespective of the wishes of the Falkland Islanders. To ask us to do that is to ask us to overturn the principle of self-determination enshrined in the Charter.' (A/39/PV. 9, pp. 29-30)

Thus, I come back to the crucial question of self-determination. As I explained yesterday, the delegation of Venezuela started the Fourth Committee proceedings on Tuesday with a set-piece statement formally denying that the Falkland Islanders enjoy the right of self-determination. Venezuela did so on behalf of a number of Latin American countries, expressly including Argentina. Then yesterday the representative of Mexico said the same thing here in a plenary meeting in introducing the draft resolution on behalf of its 20 sponsors. In fact, the representative of Mexico said that the self-determination argument should be seen as a smokescreen cloaking the purpose of prolonging an illegal occupation.

I am afraid that there is no change on the fundamental point.

That is why I raised three times yesterday the same question, the question whether Argentina recognized the inalienable right of the Falkland Islanders, just like any other colonial population, to self-determination. I gave the representative of Argentina opportunities to answer this question, to distance himself from some of the things that had been said by others, perhaps over-enthusiastically, in Argentina's name. He did not do so. In fact, he, too, expressly rejected the idea that self-determination applied in what he called this special and exceptional case.

We heard reference yesterday to Article 1 of the Charter. Article 1 says, among other things, 'respect for the principle of equal rights and self-determination of peoples'.

This is a principle which applies in the case of the Falkland Islands, as elsewhere. This is not a special or exceptional case. The Falkland Islanders do have a Government that they chose themselves; they do have the right to choose for themselves in the future.

(A/39/PV. 46, pp. 46-7).

In closing his statement on the topic of decolonization, the United Kingdom representative, Mr P. Maxey, told the Fourth Committee of the General Assembly of the United Nations on 8 November 1984:

... the Committee of 24 has now sent missions to all our Caribbean dependent territories, frequently more than once. We welcome these visits. They provide a means of demonstrating our willingness to cooperate with the United Nations over the advancement of non-self-governing territories. But perhaps we welcome them most of all because they provide UN delegations with an opportunity to see what self-determination means on the ground, as it were. Self-determination has of course been the guiding principle of the decolonisation policies of successive British governments since the Second World War and will continue to be so. We are proud of our record in bringing so many dependent territories to independence in accordance with the Charter and with the wishes of the peoples concerned; and we pledge ourselves once more to promote the universal principle of self-determination, a principle that ensures that all peoples, without exception, should be able to plan their own future in peace, in prosperity and in freedom.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate in the House of Commons, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

Our policy on the Arab-Israel dispute is clear and consistent. I explained it in the same terms to Israeli Ministers and Palestinian representatives: the same terms I have also used in discussions with Arab leaders. It is based on the firm belief that no durable settlement is possible without acceptance by the parties of two basic principles. These principles, which cannot be repeated too often, are Israel's basic right to a secure and peaceful existence, and the Palestinians' right to self-determination.

(HC Debs., vol. 67, cols. 332-3: 9 November 1984; see also oral answer of the Secretary of State, *ibid.*, cols. 670-1: 14 November 1984, and HL Debs., vol. 457, col. 32: 7 November 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Successive British Governments have taken it as axiomatic that real and permanent stability in Europe will be difficult to achieve so long as the German nation is divided against its will. Heads of Government of the Western European Union—as members of NATO—joined in making the following declaration by NATO Heads of Government in Bonn on 8 June 1982:

‘We recall that the rights and responsibilities of the Four Powers relating to Berlin and Germany as a whole remain unaffected and confirm our support for the political objective of the Federal Republic of Germany to work towards a state of peace in Europe in which the German people regains its unity through free self determination.’

(HC Debs., vol. 68, Written Answers, col. 327: 23 November 1984)

In the course of a debate on the subject of Gibraltar, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

I have given the specific assurance reaffirming the proposition set out in the preamble to the 1969 constitution that

‘Her Majesty’s Government will never enter into arrangements under which the people of Gibraltar would pass under the sovereignty of another state against their freely and democratically expressed wishes.’

There is no doubt about the wishes and feelings of the people of Gibraltar at the present time. That was established in a referendum some time ago. It may not be desirable to continue to test the temperature in that way. That will have to be considered by the Gibraltar Government. However, the principle that I have enunciated stands unqualified.

(Ibid., vol. 68, col. 932: 28 November 1984; see also HL Debs., vol. 457, cols. 910–11: 28 November 1984)

**Part Three: II. A. 1. (c).** *Subjects of international law—international organizations—in general—legal status—privileges and immunities*

The Foreign and Commonwealth Office submitted a memorandum, dated 6 June 1984, on the subject of diplomatic immunities and privileges to the Foreign Affairs Committee of the House of Commons which was investigating this subject in the wake of the shooting incident at the Libyan mission in London on 17 April 1984. The memorandum took the form of questions and answers.

*Question 27*

*What are the principal differences between the diplomatic immunities and privileges of foreign missions and those of international organisations?*

(a) *Organisations*

52. Under the International Organisations Act 1968 as amended by the International Organisations Act 1981, HMG may by Order in Council provide that any international organisation of which the UK and at least one other foreign government are members enjoy the following privileges and immunities:

- (1) Immunity from suit and legal process.
- (2) The like inviolability of official archives and premises of the organisation as, in accordance with the 1961 Convention Articles, is accorded in respect of the official archives and premises of a diplomatic mission.
- (3) (i) Exemption or relief from taxes, other than duties (whether of customs or excise) and taxes on the importation of goods.

(ii) The like relief from rates as in accordance with Article 23 of the 1961 Convention Articles is accorded in respect of the premises of a diplomatic mission.

(4) Exemption from duties (whether of customs or excise) and taxes on the importation of goods imported by or on behalf of the organisation for its official use in the United Kingdom, or on the importation of any publications of the organisation imported by it or on its behalf, such exemption to be subject to compliance with such conditions as the Commissioners of Customs and Excise may prescribe for the protection of the Revenue.

(5) Exemption from prohibitions and restrictions on importation or exportation in the case of goods imported or exported by the organisation for its official use and in the case of any publications of the organisation imported or exported by it.

(6) Relief, under arrangements made either by the Secretary of State or by the Commissioners of Customs and Excise, by way of refund of duty (whether of customs or excise) paid on imported hydrocarbon oil (within the meaning of the Hydrocarbon Oil Duties Act 1979) or value added tax paid on the importation of such oil which is bought in the United Kingdom and used for the official purposes of the organisation, such relief to be subject to compliance with such conditions as may be imposed in accordance with the arrangements.

(7) Relief, under arrangements made by the Secretary of State, by way of refund of car tax paid on any vehicles and value added tax paid on the supply of any goods or services (Section 55(5) Financial Act 1972) which are used for the official purposes of the organisation, such relief to be subject to compliance with such conditions as may be imposed in accordance with the arrangements.

These constitute broadly the same privileges and immunities as are enjoyed by diplomatic missions.

(b) *Individuals*

53. High officers may be accorded broadly the same privileges and immunities as diplomatic agents. There are only 13 high officer posts, in 10 organisations based in London, who are given such treatment.

54. Senior officials and other officials notified to the Foreign and Commonwealth Office may be accorded immunity from suit and legal process only in respect of things done or omitted to be done in the course of the performance of official duties; exemption from UK income tax on their emoluments from the organisation; exemption from customs duties on first arrival to take up their post; exemption from customs duties for one car plus one replacement of that car; and exemption from search of baggage at the time of first installation. They thus enjoy substantially less immunity but broadly the same level of privileges as members of the administrative and technical staff of a diplomatic mission.

(*Parliamentary Papers*, 1983-4, HC, Paper 499-i, p. 10)

The Foreign and Commonwealth Office submitted to the Foreign Affairs Committee of the House of Commons a memorandum, dated 16 July 1984, on the subject of diplomatic immunities and privileges. The following extract is taken from this document:

**Question 6.** *Is the Government broadly satisfied that there is no significant abuse of the more limited immunities and privileges accorded to international organisations?*

Most officials working for international organisations are immune from criminal jurisdiction only in respect of their official acts. So far as we are aware, very few breaches of our law have been committed by persons connected with international organisations.

(Ibid., 1984-5, HC, Paper 127, p. 85)

Moving the approval in the House of Lords of the International Tropical Timber Organization (Legal Capacities) Order 1984, the Government spokesman, Baroness Trumpington, stated in part:

The International Tropical Timber Agreement requires that the organisation be granted legal personality by all participating members, and that is the sole purpose of the draft order before your Lordships. It grants no other privileges, nor any immunity to the organisation. It is, however, a necessary step towards enabling us to ratify the agreement.

(HL Debs., vol. 454, col. 1387: 17 July 1984)

Moving the approval in the House of Lords of the draft EUTELSAT (Immunities and Privileges) Order 1984, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

The convention establishing the European Telecommunications Satellite Organisation 'EUTELSAT' was adopted at an inter-governmental conference in Paris on 15th July 1982, and has been signed by Her Majesty's Government. But it is necessary to make an order under the International Organisations Act 1968 to give effect to Articles IV and XVII(b) of the convention, which deal with the legal personality of EUTELSAT and certain fiscal privileges, before ratification by Her Majesty's Government.

EUTELSAT will be the successor to Interim EUTELSAT, which was established in 1977, and of which British Telecommunications plc is a member. EUTELSAT's status is defined in two texts: the convention to which the United Kingdom will be a party with your Lordships' approval, and the Operating Agreement which British Telecom has signed.

The draft order confers no immunity from jurisdiction on the organisation or its staff members. A separate protocol covering other appropriate privileges and immunities will be negotiated at a later date. The draft order confers only legal capacities, exemption from income and capital gains tax, and exemptions from customs and excise duties, the latter being limited to equipment related directly to work of the organisation.

(Ibid., vol. 458, col. 416: 13 December 1984)

Moving the approval of the draft International Lead and Zinc Study Group (Immunities and Privileges) (Amendment) Order 1984, the same Minister stated:

This only deals with exemptions from social security contributions for officials of the group who are neither United Kingdom nationals nor permanently resident in the United Kingdom. The draft order would enable the United Kingdom to give effect to an exchange of Notes between Her Majesty's Government and the

group concerning social security arrangements. The group already enjoys certain immunities and privileges under the International Lead and Zinc Study Group (Immunities and Privileges) Order 1978.

The first meeting of the group took place in Geneva in 1960 to discuss problems arising from international trade in lead and zinc. The headquarters, originally in New York, moved to London in 1977. The London office currently employs seven people, of whom five are permanently resident in the United Kingdom. The draft order before your Lordships would therefore apply at present only to the two remaining non-permanently resident employees. Her Majesty's Government attach great value to the continued presence in London of the group's headquarters and to its work in providing a forum for inter governmental consultation on world trade in lead and zinc.

(HL Debs., vol. 458, cols. 416-17)

Moving the approval of the draft Inter-American Development Bank (Immunities and Privileges) (Amendment) Order 1984, the same Minister stated:

This draft order would exempt certain officials of the bank from social security contributions and also accord limited Customs and Excise provisions on first arrival in the United Kingdom for the bank's staff members who are neither United Kingdom nationals nor permanently resident in the United Kingdom.

Your Lordships may be aware that the bank currently enjoys certain immunities and privileges under an Order in Council made in 1976—the Inter-American Development Bank (Immunities and Privileges Order) 1976. The bank was established in 1959 to promote the social and economic development of Latin American and certain Caribbean countries, including members of the Commonwealth. The United Kingdom joined in 1976 and is represented on the board of governors.

Since joining, Her Majesty's Government have committed nearly 500 million dollars to it, which is an indication of the importance that the Government attach to the valuable role fulfilled by the bank in the development field. The headquarters of the bank are in Washington. There is also a small office in London, providing direct contact with the City. The London office has a staff of two, of whom one is non-permanently resident and will benefit under the draft order.

(Ibid., col. 417)

In conclusion, Baroness Young observed:

The first of these three orders provides a very limited range of privileges; the second, social security provisions only; and the third, social security exemptions and Customs and Excise provisions. None accords immunity from jurisdiction either to an organisation or to its staff members.

(Ibid.)

**Part Three: II. A. 2. (a).** *Subjects of international law—international organizations—in general—participation of States in international organizations—admission*

(See Part Three: I. B. 1. (item of 15 February 1984), above)

**Part Three: II. A. 2. (b).** *Subjects of international law—international organizations—in general—participation of States in international organizations—suspension, withdrawal and expulsion*

In the course of a debate in the House of Lords on the subject of sovereignty in international law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

The situation is that membership of the United Nations once granted is not thereafter unconditional. The charter is a treaty and its rules bind the members. Article 5 provides that,

‘a Member . . . against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership’;

and Article 6 that

‘a Member . . . which has persistently violated the principles contained in the present Charter may be expelled’.

However, while it might be alleged that some states deserve action to be taken against them under these articles, none has ever been suspended from the exercise of the rights and privileges of membership or expelled from the United Nations. Partly this reflects the political reality that on such an issue agreement within the Security Council, and particularly between the permanent members, is unlikely; and partly a feeling, which we generally share, that offending states are more likely to be influenced by international opinion if they remain members of the United Nations.

(Ibid., vol. 448, col. 342: 15 February 1984)

At the 6th Meeting of the 19th Congress of the Universal Postal Union, held on 21 June 1984, the United Kingdom representative stated in respect of a draft resolution to expel South Africa that:

. . . his delegation had to state that, in its view, a decision by Congress to expel a member state of the Union would be clearly inconsistent with the Constitution of the UPU and that draft resolution 024, if adopted, would be illegal. His delegation believed that it raised major constitutional problems. His delegation fully understood the abhorrence of apartheid expressed by that resolution but believed that it would be a mistake for Congress to turn down the road of illegality.

(Text provided by the Foreign and Commonwealth Office)

On signature of the Acts of the 19th Congress on 24 July 1984, the United Kingdom made a declaration which read in part:

. . . the United Kingdom considers that the decision—resolution C 7—relating to South Africa which has been taken by the Congress is in violation of the UPU Constitution, which contains no provision for the expulsion of members. It is also contrary to the principle of universality, which principle applies *inter alia* to the specialized agencies of the United Nations such as the UPU. The United Kingdom deplores initiatives of a purely political character which cannot but be detrimental to the UN Organization which is based on the closest possible co-operation between all members of the international community without distinction.

For these reasons the decision taken by the Congress is deemed by the Government of the United Kingdom to be unacceptable and without any legal or political consequence. The United Kingdom continues to regard South Africa as a member of the Universal Postal Union and will therefore maintain its relations with the South African postal administration.

(Congress document 100/Add 27)

**Part Three: II. A. 3.** *Subjects of international law—international organizations—in general—legal effect of acts of international organizations*

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Our policy is to comply scrupulously with those resolutions of the Security Council which are mandatory, and to determine our attitude to other resolutions—including those adopted by the General Assembly, which are recommendatory and non-binding in character—according to their merits.

(HC Debs., vol. 52, Written Answers, col. 394: 23 January 1984)

In the course of a debate in the House of Lords on the subject of foreign affairs, the Minister of State, Foreign and Commonwealth Office, Baroness Young, referred to the recent resolution in the General Assembly of the United Nations on the Falkland Islands situation and observed:

The resolution was passed, but it is, of course, not binding on member states.

(HL Debs., vol. 457, col. 32: 7 November 1984)

**Part Three: II. B. 1.** *Subjects of international law—international organizations—particular types of organizations—universal organizations*

(See Part Three: II. A. 2. (b). (item of 24 July 1984), above, and Part Eight: IV. (item of 29 November 1984), below)

**Part Three: II. B. 2.** *Subjects of international law—international organizations—particular types of organizations—regional organizations*

In reply to a question on the subject of the Western European Union, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

The WEU is the only European organisation empowered by treaty to discuss defence and security matters. The organisation was set up under the provisions of the modified Brussels treaty of 1954. The treaty is important to the United Kingdom. It contains a binding mutual defence commitment, stronger than that of the North Atlantic Treaty, and it provides the legal basis on which we keep ground and air forces on the mainland of Europe.

(HC Debs., vol. 62, Written Answers, col. 125: 19 June 1984)

**Part Three: II. B. 3.** *Subjects of international law—international organizations—particular types of organizations—organizations constituting integrated communities*

(See also Part Three: I. C. 4., above)

In reply to the question what mechanisms exist to prevent the European Assembly exceeding functions and powers given to it by the Treaty of Rome, the Minister of State, Foreign and Commonwealth Office, wrote:

Under the European Coal and Steel Community (ECSC) treaty, the powers of the European Parliament are circumscribed by article 38 under which the court, on the application of a member state, may declare an Act of the Parliament void. There is no provision in the EEC treaty which expressly confers a similar jurisdiction on the European Court. The court has ruled, however, that the actions of the Parliament which concern all three Communities indivisibly can be challenged under article 38 of the ECSC treaty.

(Ibid., vol. 52, Written Answers, col. 391: 23 January 1984)

In reply to the question what additional powers have been granted to the European Assembly since the United Kingdom joined the European Economic Community, the Prime Minister wrote:

Since the United Kingdom's accession on 1 January 1973, there has only been one treaty which gave additional powers over expenditure to the European Parliament. This was the

'Treaty amending certain financial provisions of the Treaties establishing the European Community and of the Treaty establishing a single Council and a single Commission of the European Communities'

signed on 22 July 1975. A copy of this treaty is in the Library of the House. The main additional powers given to the Parliament under this treaty were as follows:

- (i) The Parliament, acting by a majority of its members and two-thirds of the votes cast, can if there are important reasons reject the draft budget and ask for a new draft to be submitted to it.
- (ii) If the draft budget has not been adopted by 31 December and the monthly one-twelfths system, as foreseen in Article 204 of the Treaty of Rome, is in operation, the Parliament can decide to spend more than the monthly one-twelfth for non-obligatory chapters which previously was decided by the Council.
- (iii) The original Treaty provided that the discharge to the Commission in respect of the implementation of the budget would be granted by the Council and the Parliament. The Treaty on 22 July 1975 gave that power wholly to the European Parliament, acting on a recommendation from the Council.

(Ibid., vol. 63, Written Answers, col. 235: 5 July 1984)

In reply to a question on the subject of the negotiations for the accession of Spain to the European Economic Community, the Parliamentary Under-Secretary of State for the Armed Forces, Lord Trefgarne, stated in part:

As far as Gibraltar is concerned, the restriction on movement which exists between Spain and Gibraltar is incompatible with the obligations which Spain will assume as a member of the Community. Agreement has been reached between the Community and Spain that in the context of the external relations

chapter the application of Community obligations in respect of external trade means, from accession, the elimination of all obstacles to trade between Spain and Gibraltar except as permitted by exceptions and derogations in accordance with Community law.

(HL Debs., vol. 455, col. 984: 17 October 1984)

In moving the approval in the House of Lords of the draft European Communities (Definition of Treaties) (Change in Status of Greenland) Order 1984, the Minister of State, Foreign and Commonwealth Office, Baroness Young, said:

The purpose of the treaty is to give effect to Greenland's wish to make the transition from membership of the Community—as a part of Denmark—to association with it. The treaty does this by removing Greenland from the scope of application of those provisions of the EEC treaty which apply to the European territory of members of the Community in general.

The EEC treaty is amended by the inclusion of Greenland within its Part IV, relating to the association of overseas countries and territories within the Community. In addition, the new treaty removes Greenland from the geographical scope of the treaties establishing the European Coal and Steel Community and the European Atomic Energy Community.

Annexed to the treaty is a protocol, which provides for duty-free access to the community for fish and fishing products coming from Greenland in return for satisfactory arrangements for access by the Community to Greenland's fishing zones. Arrangements were also agreed between Greenland and the Community to provide for a framework fisheries agreement. This established principles governing Community fishing in Greenland waters, with a protocol setting the initial quotas for Community fishermen for the first five years.

Your Lordships will be aware that the effect of the order is that the treaty with attached protocol will be able to operate in the law of this country in accordance with their provisions.

It may be helpful to your Lordships if I briefly describe the background to Greenland's desire for a change in status. Greenland, though geographically distinct from the continent of Europe, was at the time of Denmark's entry into the Community fully integrated with the Kingdom of Denmark, of which it was and is a part. It was therefore obliged to join the Community with the rest of Denmark, though 60 per cent. of the Greenland population voted against membership in the referendum in which Denmark voted to accept membership. In 1979, however, there came an important change in Greenland's relationship with the rest of Denmark. She received a substantial degree of home rule, and in elections in 1979 the Greenland party opposed to EC membership won a majority.

Fisheries are Greenland's major economic activity, accounting for half of her exports. The Greenlanders have always seen disadvantages in the application of the Community's fisheries policy for which, as a territory remote from other member states and with relatively little industry or agriculture, they saw few compensating advantages. In a referendum on the membership issue in February 1982, Greenland opted for withdrawal by a small majority and sought associated status under the Community's arrangements for OCTs.

In May 1982 the Danish Government, therefore, submitted a memorandum to the Council of Ministers proposing that Greenland should cease to be within the geographical scope of the treaties establishing the European Coal and Steel Community and European Economic Community and be added to the list of OCTs in Annex IV to the EEC treaty. But as the treaties contain no provision for the withdrawal of a member state, or a part of one, the precise terms of Greenland's change in status had to be negotiated within the Community in order to provide appropriate amendments to the treaties. In the course of negotiations it was also agreed that Greenland should cease to be within the geographical scope of the treaty establishing the European Atomic Energy Community. After discussion in the Council on a request from Denmark the treaty referred to in the schedule to the order was signed in Brussels on 13th March 1984, subject to ratification.

The treaty is to come into force on 1st January 1985 if all member states have ratified it by then. Otherwise it will come into force one month after the last state has ratified. Subject to the views of this House, we expect to have completed the necessary procedures for ratification by 1st January 1985 deadline.

(Ibid., vol. 456, cols. 593–5: 31 October 1984)

**Part Three: III. D. *Subjects of international law—subjects of international law other than States and organizations—mandated and trust territories, Namibia***

During the course of a debate on the release of UNITA prisoners in Angola, the Minister of State, Foreign and Commonwealth Office, Mr Malcolm Rifkind, stated:

The Government have already made it clear that they believe that Namibian independence can best be achieved on the basis of Security Council resolution No. 435. . . . when my right hon. Friend the Prime Minister meets Mr. Botha one of the main subjects to be discussed will be the situation in Namibia, and a desire to see early independence for that country.

(HC Debs., vol. 60, col. 20: 14 May 1984)

In the course of a statement in the Third Committee of the General Assembly of the United Nations on 12 October 1984 on the subject of the importance of the universal realization of the right of peoples to self-determination, the United Kingdom representative, Mr R. Fursland, remarked:

The South African presence in Namibia is also, in our view, unlawful. It is our firm view that South Africa should withdraw without delay, by implementing the UN settlement plan which provides a timetable for elections to the Constituent Assembly. The peoples of Namibia—like the peoples of Afghanistan and Cambodia—have been denied their right of self-determination for far too long. With our partners in the Contact Group and the Front Line States, we have committed ourselves to an internationally acceptable settlement in Namibia based on the UN plan endorsed by Security Council Resolution 435. The implementation of this plan will provide the people of Namibia—*all* the people of Namibia—with the opportunity for self-determination so long denied to them.

(Text provided by the Foreign and Commonwealth Office)

**Part Three: III. F. *Subjects of international law—subjects of international law other than States and organizations—miscellaneous***

In the course of an explanation of vote in the Sixth Committee of the General Assembly of the United Nations on 7 December 1984, the United Kingdom representative, Mr F. D. Berman, referred to the Convention on the Representation of States in their Relations with International Organizations of a Universal Character, 1975. He continued:

Moreover, the Convention of 1975 applies only to States. It does not apply to national liberation movements and its scope cannot be widened by resolution so as to extend to them. My delegation deplores the fact that this resolution, like others in the past, should make such a fruitless attempt.

Furthermore, my delegation takes the view that there is no justification for the resolution to call upon States to accord to certain national liberation movements, functional privileges and immunities. An entity other than a State cannot be regarded as the same as the government of a State. A national liberation movement does not have the same ability as a government to provide the guarantee of good conduct and behaviour which a host country is entitled to require. A host state is no less entitled than other states to follow generally accepted practice in the matter of privileges and immunities.

In short, Mr Chairman, my delegation sees no utility in the Resolution. For this reason, my delegation voted against it and we see no purpose in continuing to consider the matter in the Sixth Committee.

(Text provided by the Foreign and Commonwealth Office)

**Part Four: I. *The individual (including the corporation) in international law—nationality***

(See also Part Three: I. C. 4. (Written Answer of 16 January 1984), above)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

There is no legal definition of a Falkland Islander. The nearest equivalent is the definition of a 'permanent resident' contained in the Falkland Islands Immigration Ordinance 1965, as amended. This definition comprises—

- (a) persons born in the Colony or Dependencies, or of parents who at the time of their birth were ordinarily resident there, or
- (b) a person ordinarily resident in the Colony or Dependencies and who has been so resident there for 7 years and since completion of such residence, has not been ordinarily resident for a continuous period of 7 years or more in any other country, or
- (c) a dependent of a person referred to in (a) or (b) or
- (d) a person who has obtained the status of British subject by reason of a grant by the Governor of a certificate of naturalisation.

(HC Debs., vol. 57, Written Answers, cols. 190-1: 28 March 1984)

During a debate in the House of Commons on the subject of the

agreement with the Chinese Government on the future of Hong Kong, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

The Chinese Government were not prepared to agree that anyone born in Hong Kong after 1997 should acquire British nationality by virtue of their connection with Hong Kong.

What we have achieved is agreement with the Chinese Government on measures which will mean that those who are British dependent territories citizens before 1 July 1997 can retain during their lifetime an appropriate status, which by definition will be a form of British nationality. As with their present status, that will not entitle them to settle in the United Kingdom. But it will enable them to use a British passport and so to avail themselves, except in Hong Kong and China, of British consular protection.

Those arrangements have been set out in a draft exchange of memoranda which, although they are not part of the agreement itself, were agreed between the two sides and published alongside the agreement.

We were not able to provide that those persons who had been British dependent territories citizens before 1997 should transmit that status to their children for one generation thereafter.

(*Ibid.*, vol. 69, col. 396: 5 December 1984)

Later in the same debate, the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, stated:

As . . . the Foreign Secretary has emphasised, the Government will introduce legislation in the new year to give effect to the nationality provisions in the United Kingdom memorandum. That will involve the creation of a new form of British nationality for former Hong Kong British Dependent Territory citizens who obtained a passport before July 1997. In general, they will enjoy the same benefits as British Dependent Territory Citizens, except for the transmissibility of their status to their children.

During the negotiation, we argued strongly for transmissibility. The Chinese Government said that it could not in any circumstances accept it, and in the end, we had to accept this measure. The House will have the opportunity to debate further the nationality questions connected with that legislation. Individual rights of abode in the United Kingdom are not affected by the agreement. British Dependent Territory Citizens do not have this right of abode now . . . nor will their future status carry that right. Rights of abode in Hong Kong are fully protected by the agreement.

...

There are only an estimated 20,000 British citizens in Hong Kong. They have the right to enter and live in the United Kingdom . . . The 3 million or so British Dependent Territories citizens in Hong Kong do not have a right of abode in the United Kingdom and will not have it in 1997 if they acquire the new status for which they are eligible under the terms of the United Kingdom memorandum. Our efforts have been directed to achieving conditions under which people will not wish to leave Hong Kong. We believe that the agreement provides those conditions.

. . . According to section XIV of annex I of the Joint Declaration, residents of

the [Special Administrative Region] will be able to use travel documents issued by the SAR Government. They will record the holder's right to return to the SAR. The Chinese Government will assist or authorise the SAR Government to conclude visa abolition agreements with states or regions. Those who are on 30 June 1997 British Dependent Territories citizens by virtue of a connection with Hong Kong will be eligible to retain a status which will enable them to use British passports after that date. Those passports will make it clear that the holders have a right of abode in the SAR, and Her Majesty's Government will do all they can to secure for the holders of those passports the same access to other countries as that enjoyed at present by holders of British Dependent Territories citizens passports. There is no reason to believe that third countries will not recognise those passports.

(HC Debs., vol. 69, col. 468: 5 December 1984)

**Part Four: V. *The individual (including the corporation) in international law—statelessness, refugees***

In reply to the question whether the spouse and children of a person recognized as a refugee will also be recognized as refugees if they are of the same nationality, the Parliamentary Under-Secretary of State, Home Office, wrote:

Her Majesty's Government observes the recommendation in the Final Act of the conference that adopted the 1951 United Nations Convention relating to the Status of Refugees. The circumstances of each case are examined in accordance with that recommendation.

(HL Debs., vol. 451, col. 124: 25 April 1984)

In reply to the question after what period of residence in the United Kingdom refugees may be granted indefinite leave to remain, the Parliamentary Under-Secretary of State, Home Department, wrote:

Normally four years after recognition as a refugee but there is no right to settlement under either the 1951 convention relating to the status of refugees or the immigration rules. Applications are considered in the light of all the relevant circumstances including the considerations set out in paragraph 97 of the immigration rules.

(HC Debs., vol. 59, Written Answers, col. 483: 11 May 1984)

During the course of a debate in the House of Commons on the subject of the agreement with the Chinese Government on the future of Hong Kong, the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, stated:

There are concerns which, understandably, are felt by members of the community in Hong Kong, that they might become stateless as a result of the agreement. We intend fully to comply with our obligations under the 1961 convention on the reduction of statelessness. It is possible that some British Dependent Territories citizens who may not be considered to be Chinese nationals will not acquire the new status in 1997. There is also the question of children born after 1997 to ex-British Dependent Territories citizens who are not considered to be Chinese nationals. I assure the House that we shall provide for

such people to have a form of British nationality if they would otherwise be stateless. The House will have an opportunity to scrutinise the legislation in due course.

(Ibid., vol. 69, cols. 468-9: 5 December 1984)

**Part Four: VI.** *The individual (including the corporation) in international law—immigration and emigration, extradition, expulsion and asylum*

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We are willing to enter into a bilateral extradition arrangement where there is known to be a significant requirement and the legislative, judicial and penal practices of the two countries are broadly equivalent. Since May 1979 proposals for the conclusion of extradition treaties have been received from Morocco, Tunisia and the United Arab Emirates. Since, however, the conditions described were not fully met in respect of these countries, no treaties were concluded. The only country with which we are currently holding discussions with a view to concluding a new treaty is Spain.

(Ibid., vol. 53, Written Answers, col. 625: 8 February 1984; see also *ibid.*, vol. 54, Written Answers, col. 383: 20 February 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

As a general rule, there is no provision for extradition to or from the United Kingdom for offences of a political character. The Extradition Act 1870 prohibits extradition from this country for these offences and our bilateral extradition treaties . . . all contain a reciprocal provision excluding such offences.

However, the 'European Convention on the Suppression of Terrorism 1977' (Cmnd. 7390) provides an important exception to this established principle. Under the terms of the convention certain offences are not regarded as political offences in relation to extradition between the contracting states. The following countries are parties to the convention:

Austria  
Cyprus, Republic of  
Denmark  
Germany, Federal Republic of  
Iceland  
Liechtenstein  
Luxembourg  
Norway  
Portugal  
Spain  
Sweden  
Switzerland  
Turkey  
United Kingdom

(Ibid., vol. 57, Written Answers, col. 493: 3 April 1984)

In reply to a question on the criteria for political asylum as contrasted with persons avoiding political retribution on financial, legal, economic or other grounds, the Parliamentary Under-Secretary of State, Home Office, wrote:

Any application for asylum is judged by reference to the definition of the term refugee contained in article 1 A(2) of the 1951 convention relating to the status of refugees. While it is possible that a person seeking to avoid retribution on the grounds specified by the hon. Member might also qualify for refugee recognition, such grounds would not of themselves warrant the protection of the convention. (HC Debs., vol. 63, Written Answers, col. 639: 12 July 1984)

In reply to a question on the subject of the Council of Europe convention on extradition, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... the United Kingdom is not a party to this convention. We do, however, have bilateral arrangements with all States which are parties to the convention except Liechtenstein, Turkey and Spain. Adherence to the convention would override those other arrangements. Were we to ratify on the basis of the Extradition Act 1870, the one currently in force, we would have to make a number of reservations, including one in respect of our *prima facie* requirement. (HL Debs., vol. 455, col. 396: 26 July 1984)

In reply to the oral question whether Her Majesty's Government will confirm that, in international law, there is no right to political asylum in consular premises, the Minister of State, Foreign and Commonwealth Office, Mr Malcolm Rifkind, stated:

I thank my hon. Friend for his comments and confirm that in international law there is no such right of political asylum. (HC Debs., vol. 65, col. 562: 23 October 1984)

In the context of the sojourn of three persons in the British consulate in Durban, South Africa, the following question was asked:

Is it not equally important that we should recognise the clear and unequivocal opinion of international lawyers on asylum? It has been said that:

'There is, in our opinion, no doubt that this right of asylum, even in the case of ambassadors, can be properly conferred only by the consent of the countries to whom they are accredited.' Does not that apply wholly to the Durban case . . . ?

The Minister of State, Foreign and Commonwealth Office, Mr Rifkind, replied:

... there has not been a specific request for political asylum but I have no reason to differ from my hon. Friend's observations on international law. (Ibid., col. 564)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

Our records show that since 3 May 1979 there have been seven occasions recorded of foreign citizens seeking sanctuary in British high commissions, Her

Majesty's embassies or consulates. This includes the current case of those in our consulate in Durban. These cases occurred in February 1980, October 1982, January 1984, April 1984, July 1984, August 1984 and September 1984.

It would not be in the public interest for me to give more details.

(Ibid., vol. 65, Written Answers, col. 813: 29 October 1984)

In reply to a question about Iranian nationals, the Minister of State, Home Office, wrote in part:

Every application for asylum is carefully considered in accordance with the immigration rules and the 1951 United Nations convention relating to the status of refugees. Where an applicant expresses a fear of return to Iran but does not qualify for asylum here, he may be allowed to remain in this country exceptionally, outside the immigration rules.

(Ibid., vol. 68, Written Answers, col. 247: 22 November 1984)

**Part Four: VII. *The individual (including the corporation) in international law—protection of human rights and fundamental freedoms***

(See also Part Three: I. A. 2. (item of 8 May 1984), and Part Three: I. C. 4. (Written Answer of 19 January 1984), above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

During the six-month period up to 31 December 1983 implementation by the Soviet Union and East European countries of their commitments under the Helsinki final act showed no significant improvement despite the fact that the provisions of the final act were underlined and in some cases strengthened in the Madrid concluding document, agreed by all the conference participants in September 1983.

(Ibid., vol. 53, Written Answers, col. 90: 30 January 1984)

In reply to the question whether Hong Kong was a party to the International Covenant on Civil and Political Rights, the Minister of State, Foreign and Commonwealth Office, wrote:

When ratifying the international covenant on civil and political rights, we extended it to Hong Kong, subject to certain reservations.

(Ibid., vol. 54, Written Answers, col. 130: 14 February 1984)

In reply to the further question whether the Hong Kong Government has complied with the provisions of the international convention on civil and political rights in its handling of the detention of the Iranian refugees held in Hong Kong prisons, the same Minister wrote:

The persons concerned are being lawfully detained, pending completion of immigration investigations, by the Hong Kong authorities according to the provisions of the Hong Kong Immigration Ordinance. In the circumstances, the international covenant on civil and political rights has no application, in view of

the reservations made by the United Kingdom in respect of Hong Kong when ratifying the covenant.

(HC Debs., vol. 54, Written Answers, col. 130: 14 February 1984)

In reply to questions on the subject of the application of certain conventions to Hong Kong, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Kingdom Government are currently bound by 69 international labour conventions. The Hong Kong Government have made declarations on 66 of these conventions in the following form:

- (i) to apply the convention without modification (29 conventions);
- (ii) to apply the convention with modification (16 conventions);
- (iii) To reserve the Hong Kong Government's decision (21 conventions).

Of these 66 Declarations, 65 currently apply. The Hong Kong Government's declaration on the application of a convention concerning labour inspection superseded their earlier declaration on the application of another convention concerning labour inspectorates in non-metropolitan territories.

The Hong Kong Government have made no declaration on the application of the following three international labour conventions ratified by the United Kingdom:

No. 80 Final Articles Revision Convention, 1946.

No. 83 Labour Standards (non-metropolitan territories) Convention 1947.

No. 116 Final Articles Revision Convention 1961.

...

Of the International conventions relating to human rights to which the United Kingdom is a party, contained in the United Nations list of instruments on human rights, the following five have not been applied to Hong Kong.

The convention relating to the status of refugees of 1951.

The protocol of 1953 amending the slavery convention signed at Geneva on 25 September 1926.

The convention against discrimination in education of 1960.

The protocol of 1967 relating to the status of refugees.

The protocol of 1962 instituting a conciliation and good offices commission to be responsible for seeking a settlement of any disputes which may arise between states parties to the convention against discrimination in education.

All the others to which the United Kingdom is a party apply to Hong Kong, subject, in some cases, to certain reservations and declarations which were published on ratification.

...

The 1951 United Nations convention and 1967 protocol relating to the status of refugees were not extended to Hong Kong. Nonetheless, the Hong Kong Government co-operate fully with the Office of the United Nations High Commissioner for Refugees.

(Ibid., vol. 54, Written Answers, cols. 275-6: 16 February 1984)

In reply to further questions on the same subject, the Minister wrote:

International Labour convention No. 116 is a procedural convention and as such places no obligations on ratifying states or their non-metropolitan territories.

...

International Labour convention No. 80 is a procedural convention and as such places no obligations on ratifying states or their non-metropolitan territories.

...

By virtue of its status as a non-metropolitan territory Hong Kong cannot make a declaration on International Labour convention No. 83. This convention allows territories of member states which ratify the convention to make declarations on a number of conventions specified in a schedule to convention No. 83 whether or not the state of which they are a dependent territory has ratified the conventions. The United Kingdom has ratified convention No. 83: Hong Kong has made declarations on eight of the conventions listed in the schedule.

...

The 1951 convention relating to the status of refugees was not extended to Hong Kong because of the territory's small size and its geographical vulnerability to mass illegal immigration. The 1967 protocol was applied only to those territories to which the 1951 convention was extended.

...

The Hong Kong Government have made declarations to apply without modifications the following International Labour conventions that have been ratified by the United Kingdom.

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Convention No.	Title
2	Unemployment, 1919
5	Minimum Age (Industry), 1919
7	Minimum Age (Sea), 1920
8	Unemployment Indemnity (Shipwreck), 1920
11	Right of Association (Agriculture), 1921
12	Workmen's Compensation (Agriculture), 1921
15	Minimum Age (Trimmers and Stokers), 1921
16	Medical Examination of Young Persons (Sea), 1921
19	Equality of Treatment (Accident Compensation), 1925
22	Seamen's Articles of Agreement, 1926
26	Minimum Wage Fixing Machinery, 1928
29	Forced Labour, 1930
32	Protection Against Accidents (Dockers), Revised 1932
42	Workmen's Compensation (Occupational Diseases), Revised 1934
45	Underground Work (Women), 1935
50	Recruiting of Indigenous Workers, 1936
64	Contracts of Employment (Indigenous Workers), 1939
65	Penal Sanctions (Indigenous Workers), 1939

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Convention No.	Title
74	Certification of Able Seamen, 1946
81	Labour Inspection, 1947
84	Right of Association (Non-Metropolitan Territories), 1947
*85	Labour Inspectorates (Non-Metropolitan Territories), 1947
97	Migration for Employment, Revised 1949
98	Right to Organise and Collective Bargaining, 1949
105	Abolition of Forced Labour, 1957
108	Seafarers' Identity Documents, 1958
115	Radiation Protection, 1960
122	Employment Policy, 1964
124	Medical Examination of Young Persons (Underground Work), 1965
151	Labour Relations (Public Service), 1978

\* The declaration on convention No. 85, which specifically applies to non-metropolitan territories, has since been superseded by a later declaration on convention No. 81 which makes similar provisions to those of convention No. 85.

The 30 conventions given above represent an increase of one over the information given in the previous reply to the hon. Member on 16 February, at column 276. The reason for this is that convention No. 42 was included erroneously in the figure given for conventions applied with modification.

The Hong Kong Government have made declarations to apply with modifications the following International Labour conventions that have been ratified by the United Kingdom:

Convention No.	Title
10	Minimum Age (Agriculture), 1921
17	Workmen's Compensation (Accidents), 1925
63	Convention Concerning Statistics of Wages and Hours of Work, 1938
82	Social Policy (Non-Metropolitan Territories)
86	Contracts of Employment (Indigenous Workers)
87	Freedom of Association and Protection of the Right to Organise, 1942
92	Accommodation of Crews, Revised 1949
95	Protection of Wages, 1949
101	Holidays with Pay (Agriculture), 1952
141	Rural Workers' Organisations, 1975
142	Human Resources Development, 1975
144	Tripartite Consultation (International Labour Standards), 1976

Convention No.	Title
147	Merchant Shipping (Minimum Standards), 1976
148	Working Environment (Air Pollution, Noise and Vibration), 1977
150	Labour Administration, 1978

The figure of 15 conventions given above is a decrease of one on the information given in the previous reply to the hon. Member on 16 February, at column 276. The reason for this is that convention No. 42 which has been applied without modification was erroneously included in the figure given in this reply.

...

The decisions to apply 15 conventions with modifications have been made because the Hong Kong Government feel that the standards laid down in the conventions are not appropriate for social, economic or political reasons. The majority of the conventions are applied in substance and the modifications are of a technical nature only. Details of the modifications to individual conventions are as follows:

No. 10 Minimum Age (Agriculture)	Children aged 13 who have completed form III of secondary education are permitted to work in agricultural undertakings under certain conditions designed to protect their health, welfare and morals.
No. 17 Workmen's Compensation (Accidents)	An employer is not liable to pay the medical expenses of an injured employee who is incapacitated for less than three consecutive days.
No. 63 Statistics on wages and hours of work	Indexes on time rates are not collected.
No. 82 Social Policy (Non-Metropolitan Territories)	There is no statutory requirement for wage records to be kept by employers in the prescribed manner.
No. 86 Contracts of Employment (Indigenous workers)	The convention's application is limited to manual workers.
No. 87 Freedom of Association and the right to organise	The consent of the public authority is required for affiliation of trade unions with international associations. Federations of trade unions may consist only of trade unions engaged in the same trade or industry, and union officials must be habitually engaged in the trade with which the union is directly concerned.
No. 92 Accommoda- tion of crews	Consultation between shipowners and trade unions is not mandatory and there is no statutory complaints procedure for trade unions.
No. 95 Protection of Wages	There is no statutory requirement that the competent authority must ensure that the value attributed to allowances in kind is fair and reasonable, and the maintenance of records in the approved form is not mandatory.

No. 101 Holidays with pay (Agriculture)	The application of the convention is restricted to manual workers and non-manual workers on a monthly salary of dollars 8,500 or more.
No. 141 Rural Workers' Organisation	The convention is applied with the same modifications which are applied to convention No. 87.
No. 142 Human Resources Development	Vocational guidance is generally not available to adults.
No. 144 Tripartite Consultation	Some representatives of both employers' and employees' organisations are directly appointed to the tripartite consultative body.
No. 147 Merchant Shipping (Minimum standards)	Two-yearly medical examinations of sea-farers are not mandatory
No. 148 Working Environment (Air pollution, noise and vibration)	Agriculture, animal husbandry, fishing, forestry and marine transport are excluded from the application of the convention.
No. 150 Labour Administration	The scope of labour administration in Hong Kong does not extend to self-employed workers.

The figure of 15 conventions given above is a decrease of one on the information given in the previous reply to the hon. Member on 16 February. The reason for this is that convention No. 42 which has been applied without modification was erroneously included in the figure given in this reply.

(HC Debs., vol. 55, Written Answers, cols. 529-32: 6 March 1984)

In reply to the question for what reason has the Hong Kong Government reserved its decision on 21 ILO conventions ratified by Her Majesty's Government, the same Minister wrote:

Twelve of the conventions on which decisions are reserved deal with social security matters. Hong Kong does not apply these because of the structure of its social security system. Social considerations preclude the application of other conventions and the subject matter of some conventions has little or no significance for Hong Kong.

The 21 International Labour conventions which we have ratified and on which the Hong Kong Government have made declarations to reserve their position are as follows:

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Convention No.	Title
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24	Sickness Insurance (Industry), 1927
25	Sickness Insurance (Agriculture), 1927
35	Old Age Insurance (Industry etc.), 1933
36	Old Age Insurance (Agriculture), 1933
37	Invalidity Insurance (Industry etc.), 1933
38	Invalidity Insurance (Agriculture), 1933

Convention No.	Title
39	Survivors' Insurance (Industry etc.), 1933
40	Survivors' Insurance (Agriculture), 1933
44	Unemployment Provision, 1934
56	Sickness Insurance (Sea), 1936
68	Food and Catering (Ships' Crews), 1946
69	Certification of Ships' Cooks, 1946
70	Social Security (Seafarers), 1946
99	Minimum Wage Fixing Machinery (Agriculture), 1951
100	Equal Remuneration, 1951
102	Social Security (Minimum Standards), 1952
114	Fishermen's Articles of Agreement, 1959
120	Hygiene (Commerce and Offices), 1964
133	Accommodation of Crews (Supplementary Provisions), 1970
135	Workers' Representatives, 1971
140	Paid Educational Leave, 1974

(Ibid., cols. 532-3)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have received a number of reports on the execution of Baha'is in Iran during June from representatives of the Baha'i community in the United Kingdom. We have already made the Iranian Government aware of our deep concern at reports of human rights violations in Iran, including those which affect the Baha'i community. We shall continue our efforts, together with our partners in the Ten, to convince them of the need to behave in accordance with internationally accepted standards in this regard.

(Ibid., vol. 64, Written Answers, col. 708: 25 July 1984; see also *ibid.*, col. 595: 24 July 1984)

In reply to a question on the subject of the treatment of political prisoners in Iran, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have persistently made clear to the Iranian Government our disquiet about violations of human rights in Iran. We co-sponsored the resolution on this question at this year's UN Commission on Human Rights. The resolution, which was adopted on 14 March, urged Iran to respect its obligations as a State party to the international covenant on civil and political rights.

(Ibid., vol. 68, Written Answers, col. 235: 22 November 1984)

In the course of a debate on the subject of the treatment of Jews in the Soviet Union, the Minister of State, Foreign and Commonwealth Office, Mr Malcolm Rifkind, stated in part:

I am conscious that by raising these issues I am not unjustifiably interfering in the internal affairs of other countries. The great achievement of the Helsinki Final Act was to put human rights issues firmly on the international agenda. Principle VII of the opening section of the Helsinki Final Act is clear, and says:

‘participating states will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.’

(HC Debs., vol. 68, col. 1066: 28 November 1984)

**Part Five: IV. *Organs of the State—diplomatic agents and missions***

(See also Part Five: VIII. A., below)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, set out a list of the States with which the United Kingdom has diplomatic relations.

(Ibid., vol. 54, Written Answers, cols. 476–8: 21 February 1984)

In reply to further questions, he continued:

The United Kingdom is represented by third countries in Argentina, Guatemala and Iran.

(Ibid., col. 478)

We accord recognition to states, rather than Governments. Of the states we recognise, we have no diplomatic relations with:

The People’s Socialist Republic of Albania  
The Argentine Republic  
Cambodia  
The Republic of Guatemala.

We also have no diplomatic relations with the Kingdom of Bhutan, but maintain friendly contacts and conduct official business with its embassy in New Delhi.

(Ibid.)

We have no substantive dealings with the Karmal regime. Following the Soviet invasion in December 1979, we withdrew our ambassador in Kabul and suspended our aid programme to Afghanistan.

(Ibid.)

In the course of an oral question on the subject of an alleged report of an attack on the British High Commissioner in Lagos, Nigeria, the Prime Minister, Mrs Margaret Thatcher, stated:

... it is the duty of the host Government to protect those in the diplomatic services.

(Ibid., vol. 56, col. 1176: 22 March 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Libyan authorities have not sought agreement for an ambassador since 1976. We regard the Secretary General of the People's Committee of the People's Bureau as having equivalent status to a chargé d'affaires ad interim.

(Ibid., vol. 57, Written Answers, col. 82: 26 March 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

All diplomatic service officers serving abroad are expected, consistent with our obligations under the Vienna convention on diplomatic relations, to respect their host country's laws and regulations, including parking and traffic laws. Specific instructions are issued by all overseas posts to ensure that officers who are road users have taken out adequate insurance on their motor cars.

(Ibid., vol. 57, Written Answers, col. 702: 6 April 1984)

After the fatal shooting of Police Woman Yvonne Fletcher outside the Libyan mission in St James's Square, London, on 17 April 1984, the Foreign and Commonwealth Office addressed the following Note, dated 22 April 1984, to the Libyan diplomatic representative in London:

The Secretary of State for Foreign and Commonwealth Affairs presents his Compliments to the Acting Secretary-General of the People's Committee of the Libyan People's Bureau and has the honour to state that Her Majesty's Government are breaking off diplomatic relations with the Socialist People's Libyan Arab Jamahiriya. In these circumstances the Acting Secretary-General of the Libyan People's Bureau in London and his staff should leave the United Kingdom at the earliest possible time and in any event no later than midnight on the night of 29/30 April 1984.

If the Libyan authorities intend to ask a third country to act as protecting power for Libyan interests in the United Kingdom they should consult Her Majesty's Government as soon as possible on the identity of the power whom they wish to protect their interests. In this case Her Majesty's Government would raise no objection to an interests section staffed by an agreed number of Libyan diplomats being maintained within the Embassy of the proposed protecting power.

(Text provided by the Foreign and Commonwealth Office)

In the course of an oral reply, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Ray Whitney, in response to the observation that it would be a breach of the Vienna Convention for Libya to prevent the movement of foreign diplomats out of Libya, stated:

I agree . . . that that would indeed be a breach of the Vienna convention.  
(HC Debs., vol. 58, col. 719: 25 April 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Rules regarding diplomatic immunity seek to ensure that the duly notified representatives of sovereign states may carry out their duties abroad free from improper interference. At the same time diplomats are legally bound to respect local laws and regulations. This balance of rights and obligations is to a very large

extent understood and adhered to both in this country and overseas. We take up every breach affecting British interests with the authorities concerned.

(HC Debs., vol. 58, Written Answers, col. 495: 25 April 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We draw the attention of diplomatic missions to all except the most minor offences committed by members of their staff. Approximately four such communications are sent every week. It would involve a disproportionate effort to list all communications in which a specific reference to article 41 [of the Vienna Convention] was made.

(Ibid., vol. 59, Written Answers, col. 42: 30 April 1984)

In a statement made to the House of Commons on the subject of the rupture of diplomatic relations with Libya, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

The so-called Libyan People's Bureau dates back to 2nd September 1979. At that time a series of self-styled revolutionary committees took over Libyan Embassies in London and in at least eight other Western European capitals. After long negotiations with the Libyan authorities, we and the other Western governments concerned, working together, in June 1980 recognised one official in each people's bureau abroad as equivalent to a Head of Mission. At the same time we and the other countries agreed to treat the people's bureaux as diplomatic missions.

(Ibid., vol. 59, col. 209: 1 May 1984)

In reply to a question about the reasons for the break in diplomatic relations with those countries with which the United Kingdom does not have diplomatic relations, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The information is as follows:

*Country and year of break*

Albania 1946.

*Reason for break*

Diplomatic relations between Britain and Albania came to an end in April 1939 when the Italians invaded Albania and brought the country into a 'personal union' under the Italian Crown. Negotiations for the resumption of normal diplomatic relations after the war were well advanced, but were broken off by the United Kingdom following the mining of two Royal Navy destroyers in the Corfu channel on 22 October 1946 when 44 British seamen died.

*Country representing* None.

*Annual cost to United Kingdom 1982-83* None.

*Country and year of break*

Guatemala 1963 (Diplomatic relations) 1981 (Consular relations).

*Reason for break*

Guatemala broke diplomatic relations because of the imminence of internal self-government for Belize, and consular relations because of Belize's independence.

*Country representing* Switzerland.

*Annual cost to United Kingdom 1982-83* £26,241.

*Country and year of break*

Argentina 1982.

*Reason for break*

The Argentine invasion of the Falkland Islands.

*Country representing* Switzerland.

*Annual cost to United Kingdom 1982-83* £184,800.

*Country and year of break*

Libya 1984.

*Reason for break*

The unprecedented abuse of diplomatic premises by the Libyans on 17 April showed the impossibility of maintaining normal relations with them.

*Country representing* Italy.

*Annual cost to United Kingdom 1982-83* at present under negotiation with the Italian Government.

The United Kingdom has never had diplomatic relations with Bhutan, which chooses to maintain relations with only three neighbouring states, nor does it have relations with Cambodia since the Government decided in December 1979 that there was no Government in that country which they could recognise.

(*Ibid.*, vol. 59, Written Answers, col. 235: 3 May 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Home Office, wrote:

By virtue of article 41 of the Vienna convention on diplomatic relations 1961, accredited diplomats are already expected to comply with the law and accordingly to hold a firearm or shotgun certificate as appropriate in respect of any firearm in their possession. Diplomatic missions are regularly reminded of this requirement.

(*Ibid.*, col. 482: 11 May 1984)

In the course of a debate in the House of Lords on the subject of diplomatic immunity and terrorist attacks, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated in response to questions:

The first one was about the Libyan Committee. I should like to confirm to the whole House that we did not regard the committee as a Head of Mission in 1979. We refused to do business with them for many months. Until June 1980, they nominated a single individual as the Head of the Mission. Then we acted with our Community partners and our example was followed by all other countries in the world with whom Libya sought to maintain diplomatic relations.

(*HL Debs.*, vol. 451, col. 1471: 16 May 1984)

The Foreign and Commonwealth Office submitted a memorandum, dated 6 June 1984, on the subject of diplomatic immunities and privileges to the Foreign Affairs Committee of the House of Commons which was investigating the subject in the light of the shooting incident at the Libyan

Mission in London on 17 April 1984. The memorandum took the form of questions and answers, extracts from which follow:

*Question 1*

*For what reason did HMG in June 1980, agree to treat the Libyan People's Bureau as a diplomatic mission?*

*Answer*

4. HMG agreed to treat the Libyan People's Bureau as a diplomatic mission, under the provisions of the Vienna Convention on Diplomatic Relations, in June 1980, after prolonged negotiations over the problems caused by this novel nomenclature. Between September 1979 and June 1980 we accepted 10 notifications of staff as entitled to diplomatic status. The conditions laid down by HMG before relations were resumed on a normal basis were clearly set out in a Diplomatic Note (text at Annex A). The US and FRG had already taken similar action, and other countries soon followed suit. It should be emphasised that the problems were at that stage merely ones of form and terminology. The People's Bureau so far as we knew was carrying out proper diplomatic functions and only proper diplomatic functions.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 1-2)

The Diplomatic Note mentioned above read as follows:

DIPLOMATIC NOTE DATED 12 JUNE 1980

Her Britannic Majesty's Embassy have the honour to thank the Foreign Liaison Bureau of the Libyan Arab Jamahiriya for their notes of October 1979 and 8 April 1980 about relations between the United Kingdom and the Socialist People's Libyan Arab Jamahiriya.

HMG welcome the assurance that the Socialist People's Libyan Arab Jamahiriya will continue to accord to the British Embassy all the usual facilities for the performance of its functions: they understand by this that the provisions of the Vienna Convention on diplomatic relations will continue to regulate questions of diplomatic privileges and immunities and other matters concerning the Embassy and its staff.

HMG agree that the Libyan People's Bureau in the United Kingdom should likewise be accorded diplomatic facilities. To meet this requirement HMG will regard the People's Bureau as a diplomatic mission so that they may accord to it the facilities, privileges and immunities provided by the Vienna Convention. For legal and administrative purposes it will be necessary for one person to be designated as being in charge of the mission: they note that Mr Musa Kusa is the Secretary of the People's Committee and they will therefore regard him as Head of Mission (*Chargé d'Affaires ad interim*) with effect from the date of this note. The other two members of the People's Committee will also be accorded diplomatic privileges and immunities from the same date. Privileges and immunities of the appropriate category will also be accorded to other members of the staff when they are notified by Mr Musa Kusa in the normal matter.

In keeping with the wishes of the Socialist People's Libyan Arab Jamahiriya,

the Mission will be referred to as the People's Bureau of the Socialist People's Arab Jamahiriya.

(Ibid., p. 13)

The questions then turned to the take-over of the London mission by the Committee of Revolutionary Students on 18 February 1984.

#### Question 7

*The Foreign Secretary . . . stated on 1 May that HMG had made clear to the Libyan authorities in February that 'unless or until they took steps to establish a customary diplomatic mission, we would not be willing to deal with them on a normal basis'. In what sense was the Bureau treated differently by HMG after the February take-over? Was the Bureau still treated as 'the premises of the mission' for the purposes of Article 22? Who, if anyone, was recognised as the Head of Mission for the purposes of Article 5?*

#### Answer

10. HM Ambassador in Tripoli informed the Libyan Foreign Liaison Bureau on 29 February that we needed confirmation of the name of the new Head of the Bureau in accordance with Article 19 of the Vienna Convention on Diplomatic Relations; that until the position of who was in charge of the mission was regularised, we would be unable to accept new notifications of appointments; and that it would therefore become progressively more difficult to conduct business with the Bureau. The Bureau continued to be treated as 'the premises of the mission' since we had no indication that it was not being 'used for the purposes of the mission'. Article 1(i) defines the 'premises of the mission' as 'the buildings or parts of buildings and the land ancillary there to, irrespective of ownership, used for the purposes of the mission including the residence of the head of mission'. Nobody was recognized as the head of the Mission.

(Ibid., p. 3)

#### Question 22

*Is it the policy of HMG to accord diplomatic status to any individual so nominated by a sending state, unless there are positive reasons for declaring an individual persona non grata, or are certain criteria regularly applied?*

#### Answer

42. HMG do not accord diplomatic status. This is done by the sending State pursuant to its right under Article 7 of the Convention freely to appoint the members of the staff of the mission. There is no obligation to notify appointments in advance (except for the Head of Mission) and advance notifications are not usual except where a visa is required. Where we are notified in advance of a nomination through the visa system, we refuse to grant the visa in cases where the nominated person is regarded as unacceptable. We also sometimes try informally to persuade Missions to withdraw a nomination in cases where the appointee is clearly fulfilling an administrative and technical rather than a diplomatic function; or is not carrying out any of the functions of the mission as described in Article 3 of the Convention. We have also pressed, successfully, for withdrawal of notification in a very few cases where criminal charges were pending.

(Ibid., p. 8)

On 20 June 1984, the Foreign Affairs Committee took evidence on the above subject from, *inter alios*, Sir Antony Acland, Permanent Under-Secretary of State and Head of the Diplomatic Service, Sir John Freeland, Legal Adviser, Foreign and Commonwealth Office, and Mr Eustace Gibbs, Assistant Under-Secretary of State, Foreign and Commonwealth Office, Vice Marshal of the Diplomatic Corps and Head of Protocol Department. The following comments were made in reply to questions from a member of the Committee:

(Sir *Antony Acland*.) Perhaps I could ask Sir John to comment on the position of buildings in relation to diplomatic immunity and the Vienna Convention and the question of entering buildings either in self-defence or in other circumstances.

(Sir *John Freeland*.) Mr Chairman, I think there is no doubt at all, of course, that the buildings had been properly regarded as premises of a diplomatic mission. Before these events took place what was happening was an attempt to regularise the mission. It would not, in my view, have been right suddenly while that process of trying to secure regularisation was going on to say that the buildings had lost their status as premises of a mission. We did not say that and I think we were bound to go on regarding them as being premises of mission.

[Q. 11.] What you are saying presumably is that as these were held to be premises of a mission, Article 22 of the Convention, which is embodied into British law, applied, to the effect that the inviolability of the premises applied and for that reason it would have been contrary to the law of this country for there to have been any disturbance of that mission by the receiving power. Is that right?

(Sir *John Freeland*.) Yes.

12. Would you also take into consideration the risk that there might be to the British mission in Libya? Was there also that consideration?

(Sir *Antony Acland*.) All throughout the actual handling of the incident the Ministers had to bear in mind whatever was done in this country would be done to the British community in Libya but the actual attitude as regards the inviolability of the People's Bureau premises was judged largely on legal grounds and, to comment on [Q. 11], it was not a question of newly giving inviolability to premises that did not already have it; it was a question of whether we were justified in taking it away from premises that already had it and whether the new circumstances were such that in accordance with the law and the Vienna Convention, we were justified in saying that the building no longer had inviolability.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 21)

42. . . . you said in paragraph 1 of your memorandum that the Vienna Convention did not create new law. Does it mean to say that the whole of the Convention represents customary international law, and does it not mean that the position would be essentially the same even if there were no Convention at all?

(Sir *John Freeland*.) I would myself slightly qualify that statement about the Convention not creating new law. It is certainly true in very large measure that what the Convention did was to codify the rules of pre-existing law, but there were some respects in which it went further and resolved issues on which there had previously been differences of opinion about the state of the law, and in some cases it developed the law. Having said that, I would add that the extent of the participation in the Convention at the moment and the extent to which its rules are

applied even by non-parties to it makes it a reasonable thing to say that the rules as they are set out in the Convention can be regarded as corresponding to what is now customary law.

(Ibid., pp. 26-7)

[Q. 54.] . . . You say that Her Majesty's Government does not accord diplomatic status since this is done by the sending state pursuant to Article 7 of the Vienna Convention. This is paragraph 42 of your memorandum to us. You go on to say that Her Majesty's Government will sometimes try to persuade a sending state to withdraw a nomination if the person concerned is performing a technical or administrative role rather than a diplomatic one or is not performing any of the functions of a mission. That is, as we understand your paragraph 42. Apart from informal pressure from Her Majesty's Government, is classification of a nominated person as a diplomat or as a member of the technical or administrative staff, or merely as a person employed in the premises, entirely and exclusively a matter for the sending state?

(Sir *Antony Acland*.) The position is that the approval of the head of mission is a matter for the receiving state. The receiving state is asked to give what is called 'agrement'—agreement—to the nomination of the head of mission, and that is done or not done on the recommendation of ministers to the head of state, to the Queen in this case. I do not know of any recent cases when 'agrement' has not been given but it is certainly within the rights of the receiving state to refuse 'agrement'. For staff within the mission the position is that the sending state can send junior staff whoever they wish, and on their arrival those people are notified to our Protocol Department and we are not required to give approval to their arrival. If subsequently they are considered to be wholly unsuitable, for whatever reason, or misbehave themselves in such a way in breach of the Vienna Convention when they are here, then we can have regard to Article 9 of the Vienna Convention and declare them *persona non grata*, but we are not required in advance to give approval to their nomination. It is only for the heads of mission.

[Q. 55.] In the case of heads of mission, what procedures do you follow internally in making a decision, which presumably you have to make in every case, as to whether the head of mission is a suitable person and you will give your agreement to his or her being sent? What procedures do you go through?

(Sir *Antony Acland*.) One considers what is known about the person concerned, one is in this case given almost invariably a curriculum vitae, one makes such inquiries as one considers appropriate or possible about the person concerned and then forms a judgment about his suitability. That is done within the Foreign and Commonwealth Office and recommendations are made to the minister in that sense.

[Q. 56.] On those who are not heads of mission, how do you establish that a nominated person—or the person who simply arrives, as I understand it—is really going to justify his or her proposed status?

(Sir *Antony Acland*.) This is a very difficult matter and it has not been the practice as far as we are concerned, or indeed the practice of most other governments in receiving states, to demand or require details of the career and curriculum vitae of the junior staff. This, of course, is something which could be considered but again I think one has to try to weigh up whether the same provision of a curriculum vitae would actually be much evidence as to the suitability or

non-suitability of that particular person. The degree of checking involved and inquiries which have to be made would be very extensive, I think in 99 per cent. of the cases it would be very unlikely to reveal anything which would initially lead one to think that the candidate was unsuitable. Our practice has been for the people to be nominated by the sending state, to arrive here and then if they, through their behaviour, prove themselves to be unsuitable to a greater or lesser degree one or other of the gradations of action which I described earlier would be taken—that the unsuitable behaviour would be brought to the attention of the head of the mission; it would be suggested to the head of the mission that it would be tactful to withdraw that person, or if they were so manifestly unsuitable, you have Article 9 of the Vienna Convention and can declare somebody *persona non grata*.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 29)

In reply to the question what instructions have been given to the Metropolitan police regarding the application of the Vienna Convention to demonstrations outside embassies, the Minister of State, Foreign and Commonwealth Office, wrote:

The Commissioner of Police of the Metropolis tells me that he has instructed his officers that, in pursuance of their duty under articles 22 and 29 of the Vienna convention—to which the Diplomatic Privileges Act 1964 gives effect—no demonstration or demonstrators should be allowed on any footway or roadway immediately outside any entrance to diplomatic premises in the Metropolitan police district. The instruction extends to people handing out leaflets, petitioning or otherwise supporting a demonstration. Demonstrators are to be allowed within close proximity to and in view of diplomatic premises provided that they create no undue obstruction.

(HC Debs., vol. 63, Written Answers, cols. 217-18: 5 July 1984; see also *ibid.*, vol. 64, col. 6: 16 July 1984, and col. 296: 19 July 1984)

A further memorandum, dated 16 July 1984, was submitted to the Foreign Affairs Committee of the House of Commons by the Foreign and Commonwealth Office. The following extract is taken from this document:

**Question 9b.** *How could the exclusion of terrorists with diplomatic immunity be achieved, given that under the Vienna Convention agreement is required only for the head of mission?*

We are able through the visa system to exclude in advance of their arrival in this country diplomats from certain countries. We should not hesitate to refuse a visa to anyone known to have been involved in terrorist activity. If such involvement were to come to light after the arrival of the individual in this country, we should declare him *persona non grata* or request his withdrawal.

**Question 10.** *Does the Government consider that isolation of States which abuse the Convention, as suggested in paragraph 58 of your Memorandum, is a fruitful line of approach: and if so, what steps are being taken to develop this line? How can such isolation be achieved within the framework of a Convention, other than by a refusal to have diplomatic relations with the countries concerned?*

In principle we support the view that the international community should concentrate on isolating any State which abuses the basic rules of the system of diplomatic relations. In practice few Governments are willing to break off diplomatic relations with another country simply as a measure of support for an ally which has already done so—primarily because no government wishes to jeopardise its overseas trade unless there appears to be no alternative. Apart from a breach of diplomatic relations, the possibilities of isolation offered within the framework of the Convention include withdrawal of a mission, withdrawal of a head of mission as a mark of disapproval, down-grading the level of head of mission (*eg* from Ambassador to Chargé d’Affaires) and exemplary declarations of *persona non grata*. Such measures can be still more effective if they are carried out by a number of countries in concert. Moving away from the question of diplomatic representation, another possibility is to refuse to allow any official visits to or from the offending State. Trade sanctions have been shown over the years to be ineffective. Boycotts on sporting links with the offending country are a possibility. It may sometimes be better to maintain a dialogue with States which abuse the norms of diplomatic behaviour than to sever all contacts. The number of States who have abused the Convention is small and each case would always have to be carefully assessed by Governments directly affected or contemplating sympathetic action. (*Parliamentary Papers*, 1984–5, HC, Paper 127, pp. 86–7)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

Diplomats of the Soviet Union—except the head of mission—Vietnam, Mongolia and China are required to obtain permission and to give at least two working days notice before travelling more than 35 miles—25 miles for Soviet diplomats—from Hyde Park Corner.

(HC Debs., vol. 67, Written Answers, col. 126: 12 November 1984)

### **Part Five: V. Organs of the State—consular agents and consulates**

(See also Part Five: VIII. A., below)

In the course of a debate on the subject of three persons who had taken up residence in the British consulate in Durban, South Africa, the Minister of State, Foreign and Commonwealth Office, Mr Malcolm Rifkind, stated:

We are concerned that it should be possible to use the consulate for normal consular purposes. Anything that impedes that is to be regretted and deplored. Any form of action which, in addition to causing administrative problems, meant that the consulate was being used for purposes related to partisan political activity in South Africa, would be in clear breach of the international obligations under which consulates operate everywhere. We have had to make it plain that any use of the consulate which was incompatible with our normal international obligations would be bound to lead to an immediate review of our position.

(*Ibid.*, vol. 65, col. 562: 23 October 1984)

Later in the debate, Mr Rifkind made the following observations:

Our concern is not that the three should indulge in political activity, but that they should not indulge in political activity in the British consulate. It is purely for

that reason that we have told them that it is not possible for us to permit access for other than medical purposes. We must ensure that there is no repetition of the abuse of such access which we have recently experienced. We took that decision with regret, but we believe that we have no choice if we are to comply fully with our international obligations.

...

The issue is whether it would be appropriate or possible for any Government with a consulate in a foreign territory to permit its use for partisan political activities. The hon. Gentleman must be aware that it would be quite wrong, whether we were dealing with South Africa, the Soviet Union or any other country, to allow political speeches or statements to emanate from a British consulate or other diplomatic premises. The hon. Gentlemen can express his views on the laws of detention in South Africa, many of which I might agree with but that does not alter the fact that we have no choice but to insist that, if we expect others to respect international law in regard to the use of diplomatic premises in the United Kingdom, we must accept our obligations. We are determined to do that.

(HC Debs., vol. 65, col. 563)

In reply to the question what conditions the United Kingdom would expect to be met before resuming consular relations with Guatemala, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

In accordance with article 2 of the Vienna Convention on Consular Relations it is not normal international practice to impose any preconditions. The establishment of consular relations between states takes place by mutual consent.

(Ibid., vol. 68, Written Answers, col. 452: 27 November 1984)

### **Part Five: VII. *Organs of the State—armed forces***

(See also Part Eight: II. C. (Written Answer of 5 July 1984), below)

The Secretary of State for Defence published the following text of his letter, dated 2 July 1984, addressed to Mr J. Enoch Powell MP:

I am replying to your letter of 31st May to Leon Brittan in which you asked about the statutory basis for security arrangements at United States bases in this country and for dealing with intruders into those bases.

There is no specific statutory provision authorising security arrangements at United States bases, nor is one needed. Facilities are made available to the forces stationed in this country as part of the NATO Alliance and, in accordance with Article VII, paragraph 10 of the 1951 NATO Status of Forces Agreement (Cmnd 9363), which sets out the terms under which the forces of one NATO member State are stationed in the territory of another, the United States authorities are permitted as a matter of policy to police those premises and to maintain order and security within them. Similar arrangements do, of course, apply to British bases in Germany.

In ensuring the security of American bases and, to take your second point, in dealing with intruders, the United States authorities are bound by the relevant provisions of United Kingdom law. Although the Visiting Forces Act 1952 does not address these specific issues, it does establish the legal position of visiting forces generally. S. 8 has the effect of enabling visiting servicemen to be placed in

the same position as their British counterparts, and this was done by the Visiting Forces (Application of Law) Order 1965. Generally speaking, therefore, United States service personnel have the same powers as British Service personnel who, in the context of your enquiry, are in the same position as the ordinary citizen. As such they enjoy the same powers to deal with trespassers, including the right to use reasonable force to remove them if they refuse to leave when asked, and to arrest an individual for breach of the peace. Under the Criminal Law Act 1967 a person also has a power of arrest in respect of an arrestable offence and, depending upon the circumstances there may also be available powers under the Official Secrets Act byelaws made under the Military Lands Act 1892.

(Ibid., vol. 64, Written Answers, col. 248: 18 July 1984)

**Part Five: VIII. A. *Organs of the State—immunity of agents of the State—diplomatic and consular immunity***

The following letter, dated 24 March 1983, was sent to all Heads of Missions and International Organizations in the United Kingdom by the Vice Marshal of the Diplomatic Corps:

I am writing to all Heads of Mission to draw to their attention the considerable concern of the Foreign and Commonwealth Office over the number of members of the Diplomatic Corps who have been found driving a motor vehicle while under the influence of alcohol. I had hoped that 1982 would see a reduction in the number of incidents of drinking and driving involving members of the Diplomatic Corps. But in fact not only was there an increase in the number of such incidents, but several of them were of an aggravated nature in that they involved high speed car chases through the streets of London and in one case violence towards the police officer concerned. In other cases diplomats have refused to co-operate with the police and have caused them unnecessary trouble and inconvenience.

Heads of Mission will understand that drunken driving is regarded as a very serious offence in this country, even if no accident occurs. It is for this reason that it has been my practice, when a member of a Diplomatic Mission or of his family has been involved in a drinking and driving incident, to write to the Head of Mission concerned asking him to discuss the incident with the offender and to make it clear that both we and the Home Office (who are responsible for the police) take a very grave view of this kind of offence. I have concluded these letters by pointing out that in the event of the person concerned committing a second offence, the consequences would be serious.

An ordinary member of the public who does not enjoy diplomatic immunity would, if found guilty by a Court of drunken driving, face obligatory disqualification, usually for a year or more for a first offence and three years for a second offence within ten years, plus either a fine of up to £1,000 or a prison sentence of up to six months or both. The purpose of obligatory disqualification is not simply to punish the offender, but to protect the public. The Foreign and Commonwealth Office would face severe criticism from Parliament, press and public if it became generally believed that diplomats accused of serious drinking and driving offences were being allowed to continue to drive on British roads without trial and without punishment. It has therefore been decided that in future it may be necessary to request a waiver of immunity in more serious cases, whether or not the individual concerned has committed a previous offence.

I should be grateful if Heads of Mission would bring the contents of this letter to the attention of all their staff. They will recall that Article 41 of the Vienna Convention on Diplomatic Relations states that it is the duty of all persons enjoying diplomatic privileges and immunities to respect the laws and regulations of the United Kingdom.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question whether the Government was satisfied that weapons were not being secretly brought into the United Kingdom, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We cannot be certain of this, since we are precluded by article 27 of the Vienna convention on diplomatic relations, from opening or detaining diplomatic bags; but we regularly remind diplomatic missions of the need for strict compliance with our laws concerning firearms. If evidence were to come to light that these laws had been flouted by a person enjoying diplomatic immunity, we should not hesitate to take firm action.

(HC Debs., vol. 56, Written Answers, col. 324: 19 March 1984)

In reply to a question about wheel-clamping of diplomatic vehicles, the Government spokesman, Lord Lucas of Chilworth, stated:

... there are differences in some countries, but in the majority of countries the clamping of diplomats' cars is not carried out. Following the announcement to your Lordships by my noble friend Lord Elton of two new measures being taken with regard to diplomats from foreign countries and foreign missions in this country, significant steps have been taken. At the time he made his statement there were 5,700 diplomatic cars which were registered with X-plates and D-plates which claimed total immunity. A thousand of these cars have been removed from that classification by 700 being plated with only the X-plate—that is, with limited immunity—by 200 motor cars being removed from the list of official fleets and by 100 motor cars being removed from the lists of household motor cars. Therefore, there are now only 4,700 motor cars with D-plates with complete immunity, and 1,000 cars previously having immunity are now liable to the full force of the law.

(HL Debs., vol. 449, col. 1105: 20 March 1984)

In the course of a debate in the House of Lords on the subject of road death and alcohol, the Government spokesman, Lord Lucas of Chilworth, stated:

Where a diplomat claiming immunity is alleged to be guilty of this offence or where in fact he takes a test which is found to be over the limit, the mission is advised and it is left for the mission to take what steps it feels desirable. I can tell the noble Lord that in the past 18 months nine members of overseas missions have, in fact, left the missions as a result of representations made by the Foreign and Commonwealth Office to the heads of those missions.

(Ibid., vol. 449, col. 1364: 22 March 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

There are 4,933 persons in the United Kingdom enjoying diplomatic immunity plus an estimated 14,000 spouses or dependent members of family. We have no means of knowing how many of these are insured to drive motor vehicles.

(HC Debs., vol. 57, Written Answers, col. 189: 28 March 1984)

On 17 April 1984, Woman Police Constable Yvonne Fletcher, while on duty, was shot dead by bullets believed to have been fired from Libyan diplomatic premises in St James's Square, London. On 22 April 1984, the Secretary of State for the Home Department, Mr Leon Brittan, and the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, announced that as the Libyan Government had not accepted a British proposal that diplomatic relations should be terminated by agreement the British Government had given all Libyan diplomatic staff in London and anyone else currently in the St James's Square premises until midnight on 29/30 April 1984 to vacate their premises and leave the country. At a press conference following this announcement, the following questions and answers, *inter alia*, were reported:

*Question:* I would like to clarify one point. If that deadline passes, can it be assumed that then the Libyan People's Bureau is no longer foreign territory and therefore can be entered at will if the people do not leave the Embassy willingly after that date?

*Mr Brittan:* It will lose its diplomatic immunity at the expiry of that date.

...  
*Question:* Could I ask you to clarify what you said about the police satisfying themselves that nobody was carrying arms and explosives when they left the building. Does this mean that the police will be searching diplomatic premises?

*Mr Brittan:* No, it does not. After they have left, the police will need to satisfy themselves that the premises are safe and free from arms and explosives. That is not the same as searching diplomatic baggage.

*Question:* So the people, when they leave the building, will not be searched and nor will their baggage?

*Mr Brittan:* When they leave the building that is a different matter. They will have to establish their identity and status and the police will have to satisfy themselves that they are not carrying arms or explosives when they leave the building, yes.

*Question:* How will they satisfy themselves if they do not search them and their baggage?

*Mr Brittan:* They will have to satisfy themselves. They will not be leaving the building carrying baggage, we envisage, and the police will have to satisfy themselves that when they leave the building they are not carrying arms or explosives in the normal way. For the protection of the police, it is entirely reasonable that they should carry out the search that is necessary to secure that objective.

*Question:* But any arms and explosives that may be there could be carried out in diplomatic baggage and would never be seen?

*Mr Brittan:* That is a different question. The diplomatic baggage—as opposed

to what people go out of the building carrying—is something which, under the Vienna Convention, enjoys diplomatic protection.

...

*Question:* Minister, you said you expected that they would comply with this week's deadline. What reason do you have for saying that, on the basis that they have not complied with any other requirements of the Vienna Convention so far?

*Mr Brittan:* Well, the position is that there have been previous occurrences of a breach of diplomatic relations in which the countries concerned have complied with universal international practice . . .

*Mr Luce:* The two most recent ones are Uganda in 1976 and the Argentine in 1982. In both cases, both countries complied with the Convention and the normal procedures took place within the time span allowed for the breaking of diplomatic relations.

*Mr Brittan:* And, of course, everyone will appreciate that if they do not leave by the prescribed date, they will lose their diplomatic status, with all that follows from that.

*Question:* What does follow from that, Minister?

*Mr Brittan:* They lose their immunity.

...

*Question:* . . . will the police be able to enter that building after the 29/30, after the people there have left?

*Mr Brittan:* . . . after that date has been reached the building will have no diplomatic immunity and the police will be entitled, if they have justification for doing so, to enter the building, yes.

*Question:* If there are weapons inside the building, which the Libyans might wish to take out in a diplomatic pouch, meaning a huge great crate, will they actually be allowed to do this before the 29th?

*Mr Brittan:* The Convention is absolutely clear, that during the wind-up of diplomatic relations the right of the inviolability of the diplomatic pouch, as you call it, remains, and that is something which we will adhere to, because we have made it quite clear that we are observing the law scrupulously and we are expecting the Libyans to do the same with regard to our own citizens and personnel in Libya.

*Question:* . . . is there any way, X-rays or whatever, any device you can use without actually penetrating the diplomatic baggage to determine whether weapons are being carried out?

*Mr Brittan:* Not if you wish to observe the Convention.

...

*Question:* If the People's Bureau in St. James's Square is put under the control of a Protecting Power, will you still be able to enter it and search it?

*Mr Brittan:* The People's Bureau will not be put under the control of a Protecting Power. The Protecting Power will, from its own Mission, exercise such facilities on behalf of Libya as is customary in those circumstances. The People's Bureau will cease being a diplomatic building.

(Text provided by the Foreign and Commonwealth Office)

In the course of a debate in the House of Commons on the same matter, the Secretary of State for the Home Department, Mr Leon Brittan, stated in reply to a question:

The legality of X-raying is in question and the overwhelming majority of states have not adopted such practices. Clearly, that is one of the questions that will be raised in the review. It is certainly an abuse of the Vienna convention to use the diplomatic bag for the purposes to which the hon. and learned Gentleman refers, but it is a feature of the convention to provide that various forms of behaviour are breaches of the convention but not to provide any way to prevent such behaviour or to deal with it when it has occurred. In addition to the doubtful legality of X-raying diplomatic bags and the fact that it would be contrary to the practice of the overwhelming majority of states, I am advised that any such scanning without opening or detaining the bag, which is plainly not permitted, would be likely to be of very limited value in determining their contents.

(HC Debs., vol. 58, col. 745: 25 April 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have no means of knowing how many times successful pleas of diplomatic immunity have been entered. It is for a court to decide whether an individual is entitled to immunity in any particular case; but if entitlement to immunity were beyond doubt, it is unlikely that proceedings would be instituted.

(Ibid., vol. 58, Written Answers, col. 632: 27 April 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Vice Marshal of the Diplomatic Corps' most recent letter to heads of diplomatic missions reminding them of the need for their staff to obey parking regulations was sent on 12 December 1983.

Diplomats are immune from the jurisdiction of the country in which they are serving and cannot therefore be required to pay parking fines. It is our understanding that 10 heads of mission require their staff to pay their fines.

(Ibid., vol. 59, Written Answers, col. 41: 30 April 1984)

Asked in a later debate on the Libyan mission shooting whether it was in accordance with the Vienna Convention for the people leaving the Libyan People's Bureau to be individually searched by electronic means, Mr Brittan replied:

I am advised that the personal search, conducted in the way that I described, was permitted under international and domestic law.

(Ibid., vol. 59, col. 207: 1 May 1984)

The Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, then made a statement on the rupture of diplomatic relations with Libya in which he said:

It has, for example, been asked whether effective measures can be adopted to prevent abuse of the diplomatic bag without requiring any amendments to the Vienna convention. The convention provides that diplomatic bags shall 'not be opened or detained'.

The question of scanning bags is not expressly covered. There is argument

whether this is permitted or not. The practice of nearly all states is, in fact, not to scan. Our own practice hitherto has been never to allow our own bags to be scanned, nor to scan the bags of others.

This topic is currently [on] the agenda of the United Nations International Law Commission. We have more than once considered whether any change of practice is desirable. Any such change would inevitably take place on a reciprocal basis. We have to decide in these cases how best to protect British interests, in particular the security of our essential communications.

(HC Debs., vol. 59, cols. 211-12)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

. . . we have now completed a detailed review of the wheel clamping of diplomatic vehicles. This review has confirmed that wheel clamping of diplomatic vehicles would be in breach of the Vienna convention on diplomatic relations, and that it is therefore not legally possible to apply wheel clamps to such vehicles. Instead, we propose to tackle the wider problem arising from the numbers of diplomatic vehicles in London. The Government are introducing the following new arrangements to reduce their numbers.

The first new measure arises from the distinction which exists between different types of diplomatic immunity. Representatives of certain international organisations, such as the United Nations and NATO and certain consular staff, are not entitled to full immunity, but only to immunity in connection with acts arising from their official duties. These representatives are at present issued with category 'X' registration plates, which are also issued to certain staff entitled to full immunity. In future, 'X' category registration plates will be reserved for vehicles whose users are only entitled to immunity arising from their official acts. I am advised that as soon as the necessary re-plating has been carried out, 'X' category vehicles, of which there will then be some 400, will be eligible for wheel clamping.

Secondly, we are placing a firm limit on the number of vehicles for which 'D' registration plates will be issued. These are plates issued for vehicles used by persons entitled to full diplomatic immunity. In future, issue of 'D' plates for official vehicles will be limited to a maximum of one set per notified diplomat per mission.

Thirdly, issue of 'D' plates for private vehicles will be limited to a maximum of two sets per diplomatic household.

These measures should result in significant reduction in the number of vehicles exempt from wheel clamping.

(Ibid., vol. 59, Written Answers, col. 206: 3 May 1984)

Referring to an observation made earlier in a debate on the Police and Criminal Evidence Bill, the Secretary of State for the Home Department, Mr Leon Brittan, remarked:

. . . for the record I should make it clear that I cannot accept his interpretation of the law, which is that it would be permissible under the law as it exists, or under the Vienna convention, to open diplomatic bags. That is not so.

There is a very important distinction to be drawn between articles 27 and 36 of the Vienna convention. Article 27 relates to the diplomatic bag, and article 36 relates to the personal baggage of the diplomatic agent. Whereas article 36 makes

it clear that in certain circumstances inspection of the personal baggage of the diplomatic agent may be permissible, article 27 does not contain, in relation to the diplomatic bag itself, any such exception. It is therefore clear, as a matter of construction and as a matter of law, that it is not permissible to inspect the diplomatic bag. Indeed, the language of the article is quite unequivocal on this point.

Similarly, the proposal that scanning should be attempted and that if anything suspicious is shown the diplomat concerned should be required to open the bag or to return it cannot be carried out because of the provisions of article 27.

(*Ibid.*, vol. 60, cols. 252-3: 15 May 1984)

It was then observed that the Italian authorities had once opened an Egyptian diplomatic trunk in which a live human was found. The Secretary of State replied:

That incident occurred before Italy became a party to the Vienna convention.

Under the Diplomatic Privileges Act 1964, the Vienna convention is incorporated into the law of this country and therefore the only way in which it would be possible to take the sort of action that has commended itself would be to remove it from the law of this country. There is no doubt that, in regard to our domestic law, it would be open to Parliament at any time to do that. If we were to do that unilaterally we would be in breach of our obligations in international law. I am sure that both sides of the House would not commend that course.

(*Ibid.*, col. 253)

In the course of a debate in the House of Lords on the subject of diplomatic immunity and terrorist attacks, in particular the shooting incident at the Libyan mission, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

In considering the lesser sanctions open to us under the existing terms of the Vienna Convention, we have to bear in mind that diplomatic relations between governments rest ultimately upon the principle of reciprocity, a point made by my noble friend Lord Broxbourne.

This is the real sanction of diplomatic law, since every state is both a sending and a receiving state. The effectiveness of the Vienna Convention—and it has, in general, proved to be very effective—rests largely on this principle.

(*HL Debs.*, vol. 451, col. 1472: 16 May 1984)

Baroness Young later added:

The Vienna Convention did not create new law. The inviolability of the envoy, both in peacetime and between peoples at war, is a rule which goes back 3,000 years. It is fundamental to the growth of any relations between states which regard each other as enemies. The Vienna Convention thus represents a codification of customary international law on immunity and on other aspects of diplomatic relations. But the very long stability of the rules of law being codified was one of the factors on which the success of the Vienna Convention depended.

It follows from this that even if it were open to us simply to denounce the Vienna Convention unilaterally this would not entitle us to disregard the basic principles of inviolability of diplomats and missions which are reflected in the

convention. Any amendments to the Vienna Convention—to which 141 states are now parties—would be a matter for international negotiation.

(HL Debs., vol. 451, col. 1473)

Baroness Young made the further remark:

My noble friend Lord Broxbourne raised a very interesting point about the privileges enjoyed by those having diplomatic immunity and corresponding obligations. Article 41 of the Vienna Convention requires the persons enjoying these privileges and immunities to respect the laws and regulations of the receiving state. It also requires the premises of the mission not to be used for any matter incompatible with the functions of the mission. We have said repeatedly that Libya was in clear breach of Article 41 of the convention.

(Ibid.)

The Foreign and Commonwealth Office submitted a memorandum, dated 6 June 1984, on the subject of diplomatic immunities and privileges to the Foreign Affairs Committee of the House of Commons which was investigating this subject in the wake of the shooting incident at the Libyan mission in London on 17 April 1984.

In the introduction to the memorandum it was written:

Diplomatic immunity is not a new concept. The principle of the inviolability of the envoy both in peace time and between peoples at war goes back some 3,000 years. The Vienna Convention did not create new law; indeed its implementation in the United Kingdom by the Diplomatic Privileges Act 1964 replaced the Diplomatic Privileges Act of 1708 which had given wider immunities and privileges. The very long stability of the rules of law being codified was one of the two other factors upon which the success of the Vienna Convention depended. The other factor was reciprocity. Every state is both a sending and a receiving state; its own representatives abroad are hostages and even on minor matters their treatment will depend on what the sending state itself accords.

(*Parliamentary Papers*, 1984–5, HC, Paper 127, p. 1)

The memorandum took the form of questions and answers. An extract from these follows:

*Question 14*

*What provisions of the Vienna Convention are regarded by HMG as ambiguous or as raising particular problems of interpretation or implementation?*

*Answer*

19. *Article 3(e)* refers to the development of cultural relations between the sending and the receiving state. We do not interpret this as meaning that we are obliged to accept cultural centres and institutes as premises of the mission. Some countries dispute this view. Acceptance of such buildings as premises would lead to considerable cost to the Exchequer, since buildings accepted as premises of a mission are entitled to diplomatic rating relief. (See comment on Article 34(b) below.)

20. *Article 22.2* refers to the special duty of the receiving state to take all appropriate steps to protect the premises of a mission. This provision sometimes

gives rise to difficulties of application: for example where the Government could not have known in advance of a particular threat, or where a mission has failed to take adequate steps to protect the security of its own premises against intruders.

21. *Article 25* states that the receiving state shall [accord] full facilities for the performance of the functions of a mission. This vague obligation has been interpreted by some missions as obliging HMG to provide them with extensive parking facilities in Central London—an interpretation which we do not accept.

22. *Article 27.3* states that the diplomatic bag shall not be opened or detained. Some states argue that this Article excludes the electronic scanning of a bag as being a form of constructive opening. On the other hand it may be argued that the Convention stops short of according 'inviolability' to the bag and that the negotiators who were fully conscious of the dangers of abuse did not intend to exclude external examination by equipment or by dogs as some kind of safeguard for the receiving state.

23. The interpretation of *Article 31.1(a)* dealing with immunity in relation to private immovable property, and *Article 34(b)*, dealing with exceptions to relief from taxes and rates, has caused difficulties of interpretation as regards principal private residences. It is however for a court of law, and not for the FCO, to determine whether a diplomat is entitled to immunity in any particular case; and there have been several reported English cases on *Article 31.1(a)*.

24. *Article 36.1* refers to exemption from customs duties 'in accordance with such laws and regulations' as the receiving state may adopt. This reference is normally interpreted as a justification for quantitative restrictions imposed on cars, spirits and tobacco products. We have recently tightened up our restrictions on cars. Some missions have found these restrictions hard to accept.

25. The term 'members of their families forming part of their respective households' in *Article 37.1* has caused some problems of interpretation. The Vienna Conference failed to agree on a definition of the term and it is for each state to apply a reasonable interpretation of it. The practice applied in the UK has not been generally challenged but individual cases such as adult students in their twenties living away from home give rise to difficulty.

26. There is no satisfactory definition of 'permanently resident' in *Article 38.1* (and elsewhere in the Convention). Some diplomats stay in London for many years, particularly those married to British nationals. The UK have over the years evolved a consistent practice, set out in a Note to Missions of 27 January 1969 (text at Annex B) which has not been generally challenged, but individual cases still give rise to difficulty.

27. We know that some diplomats engage in business activities in direct contravention of *Article 42*. We have no powers to prevent this, except by the extreme sanction of declaring them *persona non grata*.

28. Some states interpret the wording of *Article 45(a)* as meaning that the premises of a mission continue to be inviolable even after a break in diplomatic relations. We do not share this view.

(*Ibid.*, pp. 4-5)

### Question 17

*What procedures, if any, exist within the United Kingdom for the monitoring or screening of diplomatic bags?*

32. None.

*On how many occasions since the coming into force of the Convention have members of the diplomatic, administrative or technical staff of foreign missions in London, or members of their families, been known to have escaped arrest under Article 29 or prosecution for alleged serious criminal offences under the protection of Article 31? What were the circumstances in each case?*

33. There have been 546 occasions in the years 1974 to 1983 inclusive and 1984 to date. For the purpose of this Answer, 'serious' is defined as 'attracting penalties of six months or more imprisonment'. The table at Annex C gives a breakdown of the type of alleged offence and the year in which it was committed. It should be noted that since the cases could not be brought to court, the offences must be regarded as not proven.

The table mentioned above was in the following form:

## DIPLOMATIC IMMUNITIES AND PRIVILEGES

[illegible]

	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984
<i>Misuse of Drugs Act 1971</i>											
3. Unlawful importation of controlled drug								1			
5. Unlawful possession of a controlled drug	1			1	3	2	1				
Total	1			1	3	2	1	1			
											(Total = 9)
<i>Offences involving violence:</i>											
<i>Offences against the Person Act 1861</i>											
20. Inflicting grievous bodily harm										1	
42. Assault		1	1	2		3		2	3	1	
47. Assault occasioning actual bodily harm				3				1		1	
<i>Police Act 1964</i>											
51(1). Assault of a police officer		2	2	2	1	1	1	1	2	2	
<i>Prevention of Crime Act 1953</i>											
1. Carrying an offensive weapon	1					1		1			
Total	1	3	3	7	1	5	1	5	5	5	
											(Total = 36)
<i>Road Traffic Act 1972</i>											
1. Death by reckless driving	1		2								
2. Reckless driving					1	5				3	
5. Driving under influence of drink/drugs	18	15	13	18	27	13	25	17	19	30	10
Total	19	26	15	18	28	18	25	17	19	33	10
											(Total = 228)
<i>Other Offences:</i>											
<i>Criminal Damage Act 1971</i>											
1(1). Destroying or damaging property				1		1	1			2	
<i>Criminal Attempts Act 1981</i>											
1. Attempted theft									1	1	
<i>Regulations of Railways Act</i>											
5(3). Fare evasion	3		1		4	1	2	1			
Total	3		1	1	4	2	3	1	1	3	
											(Total = 19)

(Ibid., p. 16)

#### Question 20

Please supply such figures as are available of the total known alleged breaches of the road traffic laws, civil laws and administrative laws by the staff of foreign Missions in London which have escaped prosecution under Article 31.

#### Answer

37. The table at Annex D shows the total alleged offences against the Road Traffic Act 1972 (including the serious offences listed in the Answer to Question 18) for the years 1974 to 1983 inclusive and 1984 to date; and the number of fixed penalty notices (parking tickets) cancelled on grounds of diplomatic immunity for the period 1974 to 1983.

38. We cannot supply a meaningful figure for alleged breaches of administrative law, such as failure to pay a debt or to honour a contract, since we do not learn of such cases except where the plaintiff brings them to our attention.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 7)

The table mentioned above was in the following form:

### ANNEX D

#### DIPLOMATIC IMMUNITIES AND PRIVILEGES

##### 1. Total alleged offences against the Road Traffic Act 1972

1974	217
1975	229
1976	225
1977	246
1978	283
1979	228
1980	197
1981	170
1982	156
1983	190
1984 (to date)	34

##### 2. Number of fixed penalty notices cancelled on grounds of diplomatic immunity

1974	52,839
1975	36,504*
1976	92,985
1977	94,534
1978	78,755
1979	52,450
1980	51,068
1981	68,940
1982	76,232
1983	102,210

\* Figures not available for the period June to September 1975.

(*Ibid.*, p. 17)

#### Question 21

*On how many occasions, if any, has Her Majesty by Order in Council taken action to restrict the immunities and privileges of foreign diplomats under the provisions of section 3 of the Diplomatic Privileges Act 1964?*

#### Answer

39. No Orders in Council have been made under the provisions of section 3 of the Diplomatic Privileges Act 1964.

40. Section 8(5) of the Act, however, provided that:

‘(5) Any Order in Council under the Diplomatic Immunities Restriction Act 1955 which is in force immediately before the commencement of this Act

shall, so far as it could have been made under section 3 of this Act, have effect as if so made'.

When the Act came into force on 1 October 1964 the Diplomatic Immunities Restriction Order 1956, as amended by the Diplomatic Restriction (Amendment) Order 1956, therefore continued in effect. This Order removed from certain classes of members of diplomatic missions (junior staff and servants) personal immunities from suit or legal process, to the extent necessary to ensure reciprocity with the treatment given to British members of diplomatic missions in the countries concerned. As each of the relevant countries in turn became parties to the Vienna Convention on Diplomatic Relations with the effect that reciprocity under the terms of the Convention was now assured, Her Majesty by Order in Council removed the relevant limitations in respect of that country. The final revocation Order, which related to the United States of America, was made in 1972.

41. The conditions necessary to enable an Order in Council to be made under section 3 of the Diplomatic Privileges Act have since then existed only as regards countries which have made reservations relating to the provisions of the Convention to which effect is given by the Act. (There have been short-term denials of reciprocity in regard to diplomatic bags but these have not lasted for long enough for an Order in Council to be made). The general policy of Her Majesty's Government since the Vienna Convention on Diplomatic Relations has been to seek to achieve the highest possible level of conformity with its terms. For that reason we have consistently objected to reservations which have seemed to us to be incompatible with the objective of a uniform regime (these reservations, apart from the Bahrain one mentioned in the answer to Question 11, have been to Article 37 of the Convention). The objective has been to seek to persuade these countries to withdraw their reservations (an objective which has been successful on some occasions) and in addition to press for reciprocal treatment on a bilateral basis for UK diplomatic staff in the reserving country.

(Ibid., pp. 7-8; see also Part Six: I. B., below)

#### *Question 25*

*With what countries, if any, has HMG entered into bilateral agreements to modify the effects of the immunity granted under Articles 29 and 31?*

#### *Answer*

48. The administrative and technical staff, service staff and private servants of Bulgaria, Czechoslovakia and USSR enjoy by virtue of special bilateral agreements the same immunity from jurisdiction and from arrest or detention and the same inviolability of residence as are enjoyed by diplomatic agents.

49. All these agreements pre-date the Diplomatic Privileges Act 1964 and were preserved in effect by its provisions. There is no power under the Act to give effect to new agreements varying the provisions of Articles 29 and 31.

#### *Question 26*

*Are the diplomatic immunities and privileges of the Missions of Commonwealth States in the United Kingdom in all respects identical to those of foreign states?*

#### *Answer*

50. No. Members of a Mission of a Commonwealth country and private

servants who are citizens of that country and of the United Kingdom are accorded the privileges and immunities to which they would have been entitled if they had not been citizens of the United Kingdom. They are thus treated more favourably than members of foreign Missions having dual nationality or citizenship, who under Article 38.1 of the Convention enjoy only immunity from jurisdiction, and inviolability, in respect of official acts performed in the exercise of their functions.

51. Commonwealth Missions are also treated more favourably in connection with refunds of VAT. Under Article 34(a) of the Convention a diplomatic agent is not exempt from 'indirect taxes of a kind which are normally incorporated in the price of goods or services'. As a concession VAT is refunded to High Commissions and to the Irish Embassy on purchases made in the UK of goods and stationery of British manufacture for the official use of the mission. Foreign missions however receive, also as a concession, VAT refunds only on purchases of substantial quantities of fine quality British furniture or furnishings for the initial equipment or for the re-equipment of the reception rooms only of the Missions or of the official residence.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 9-10)

#### *Question 28*

*On which countries' initiative was the decision taken by the UN General Assembly in 1976 to refer the question of diplomatic bags and couriers to the International Law Commission? What is HMG's present attitude to the draft articles currently under consideration by the ILC?*

#### *Answer*

55. At the 65th meeting of the 6th Committee of the General Assembly on 7 December 1976, the representative of the Union of Soviet Socialist Republics introduced a draft resolution (A/C.6.31, L.16) on behalf of Argentina, Bulgaria, Cuba, Cyprus, German Democratic Republic, Hungary, Mali, Poland and the Union of Socialist Republics, later joined by Algeria, Burundi, and the Byelorussian Soviet Socialist Republic, Czechoslovakia, Egypt, India, Liberia, Panama, and Somalia. The draft resolution included the following paragraph:

'4. *Requests* the International Law Commission at the appropriate time to study, in the light of the information contained in the report of the Secretary-General on the implementation by States of the provisions of the Vienna Convention on Diplomatic Relations of 1961 (A/31/145 and Add.1) and other information on this question to be received from Member States through the Secretary-General, the proposals on the elaboration of a protocol concerning the status of the diplomatic courier and the diplomatic bag not accompanied by the diplomatic courier which would constitute development and concretization of the Vienna Convention on Diplomatic Relations of 1961;'

56. The UK have consistently maintained a reserved attitude to this exercise by the International Law Commission, particularly having regard to the fact that the principal objective of the sponsors of the original resolution was to provide increased inviolability and immunity for the bag and the courier. They have studied the draft articles which are currently under consideration by the International Law Commission, which provide, in accordance with the original intentions of those who raised this question, for substantially increased immunities for bag and courier. They continue to believe that these articles do not reflect the way

in which the provisions of the Vienna Convention on the bag and the courier ought to be developed.

(Ibid., p. 12)

The following memorandum, dated 19 June 1984, was submitted to the Foreign Affairs Committee of the House of Commons by the Home Office:

**Question (a).** *What problems are caused to the Home Office and the police in their work by the operation of, and actual or potential abuse of, the Vienna Convention?*

## I. INTRODUCTION

1. The Commissioner of Police has been consulted and this memorandum has been prepared with the benefit of his advice. Part II of this memorandum deals with the position arising under those articles of the Vienna Convention on Diplomatic Relations which confer certain privileges and immunities on members of a diplomatic mission. It may be helpful, first however, to refer briefly to certain provisions of the Convention which concern the physical protection of diplomats and diplomatic premises, the duties and obligations of diplomats themselves and the remedy open to a receiving state in the event of unacceptable behaviour by diplomats. The police have a general duty to maintain the peace, but Articles 22, 29, 30 and 37 of the Vienna Convention place a special duty on a receiving State to protect the premises of a diplomatic mission and the private residences of diplomatic agents and of administrative and technical staff and to take appropriate steps to prevent any attack on the person, freedom or dignity of diplomatic agents and their families and on the administrative and technical staff and their families (if not nationals of the receiving State or permanent residents). The burden of ensuring that these special duties are fulfilled falls to the police who are dependent on the willing co-operation of missions when carrying out their duties. In turn, Article 41.1 of the Convention places a duty on all persons enjoying privileges and immunities to respect the laws and regulations of the receiving State, and also a duty not to interfere in the internal affairs of that State; and Article 41.3 confers an obligation on the sending State not to use the premises of the mission in any manner incompatible with the functions of the mission as laid down in the Convention (*viz* Article 3) and under general international law.

2. The existence, by virtue of Articles 29 and 30 of certain immunities and privileges may limit the action which the police can take when investigating and preventing crime; but when evidence is available of an entitled person's involvement in breaches of the criminal law, Article 9 of the Vienna Convention enables the receiving State to notify the sending State that the head of mission or any member of the diplomatic staff of the mission is *persona non grata* or that any other member of the staff is not acceptable. The police and the Home Office therefore maintain close links with the Foreign and Commonwealth Office and all incidents known to the police involving persons entitled to diplomatic immunities and privileges are reported to them. (See answer to question (b) below.)

## II. RELEVANT ARTICLES OF VIENNA CONVENTION

### *Inviolability of Premises and Special Duty to Protect*

3. Article 22 provides that the premises of a mission are inviolable; and agents of the receiving State may not enter them without the consent of the head of the mission; the premises, together with the furnishings and other property thereon

and the means of transport of the mission are immune from search, requisition, attachment or execution; the receiving State is under a special duty to protect the premises of the mission and to prevent any disturbance of the peace of the mission or impairment of its dignity.

4. Similar inviolability (and protection) extends to the private residence of a diplomatic agent by Article 30 and to the residences of members of the administrative and technical staff of the mission who are neither nationals of, nor permanently resident in, the receiving State by Article 37.

5. The immunity of the premises of the mission and of its means of transport has caused and continues to cause problems for the police in their work of preventing and responding to acts of terrorism. Incidents have occurred when the police have had strong grounds for believing that diplomatic premises contained illegally held arms and explosives which had been or might be used in the commission of acts of terrorism. The police are unable in these circumstances to enter and search the premises for evidence of actual or potential criminal offences. The police are also unable to enter diplomatic premises to deal with breaches of public order. (In April 1984, for example, demonstrators entered the Consular Section of the Iranian Embassy where they were detained by consular staff who for several hours refused access to the police.) Police are entitled to stop vehicles with diplomatic registration to establish that the occupants have diplomatic status.

6. The special duty of the receiving State to *protect* a diplomatic mission requires the use of police to provide routine security cover. There is thus a continued demand on police manpower which may be considerably increased at times when there is a general or specific threat (*eg* a terrorist threat) to the premises. But it is doubtful whether this in itself can reasonably be regarded as a 'problem' caused by the operation of the Vienna Convention, since the police have a general duty to prevent disorder and threats to the security of premises and property. However, the police point out that the special duty of protection sometimes provides missions with the excuse for laxity in taking their own security precautions, and this makes the police task more difficult.

#### *Inviolability of Diplomats and Duty to Protect*

7. Article 29 provides for the inviolability of the person of a diplomatic agent and for his immunity from any form of arrest or detention; and requires the receiving State to take all appropriate steps to prevent any attack on a diplomat's person, freedom or dignity.

8. Similar inviolability and immunity extends to the members of the family of a diplomatic agent and to members of the administrative and technical staff of a mission and their families, if they are not nationals of or permanently resident in the receiving State.

9. Immunity from arrest or detention prevents the police from arresting or detaining a diplomat suspected of having committed an offence under the general criminal law, or of being involved in the commission, preparation or instigation of acts of terrorism under the prevention of terrorism legislation. The lack of power to arrest a diplomat suspected of having committed a criminal offence may also have the effect of inhibiting the police in their duty to prevent further offences whether by that person or by another person. The view has always been taken that, in exceptional circumstances, the police may take measures to prevent further offences from being committed and that in appropriate cases the police may also

invite a person who claims diplomatic immunity at the scene of a crime to accompany them to a police station with a view to the proper establishment of identity. Such action will be achieved by persuasion. Inviolability prevents the police from searching a person with such an entitlement to recover a weapon or explosives which he may be carrying, although the police are entitled to stop a person to establish whether he is a *bona fide* diplomat. The requirement to provide a physical protection makes demands on police manpower in the same way (although not to the same extent) as the requirement to protect diplomatic premises.

### *The Diplomatic Bag*

10. Article 27, paragraph 3 provides that the diplomatic bag shall not be opened or detained, and paragraph 4 that the diplomatic bag may contain only diplomatic documents or articles intended for official use. There are grounds for concern that the immunity of the diplomatic bag is in a few cases seriously abused. Although such abuse of the diplomatic bag violates Article 27.4, the police are prevented by Article 27.3 from opening and searching the diplomatic bag or, by Article 27.1 from requiring that it be returned to the country of origin. Electronic scanning of diplomatic bags is not expressly covered by the Convention. There is argument whether this is permitted or not. The practice of nearly all states is in fact not to scan. It has hitherto been the practice of HMG neither to permit British bags to be scanned nor to scan the bags of others. As the Home Secretary has indicated (Official Report, 1 May, Col. 205), there is in any case doubt about the efficacy of scanning to detect prohibited articles which can be disguised to appear wholly innocuous on an X-ray screen. The success of such scanning relies on the ability to open bags. An abuse of the diplomatic bag is therefore likely to be exposed only if the content of the bag is fortuitously disclosed.

### *Consular Premises*

11. Article 31 of the Vienna Convention on Consular Relations provides inviolability for consular premises, but to a more limited extent than for diplomatic premises. Police are prohibited only from entering 'that part of the consular premises which is used exclusively for the work of the consular post' except with the consent of an appropriate consular official. However, that consent may be assumed 'in case of fire or other disaster requiring prompt protective action.' This gives the police more scope to deal with threats to public order or safety at consular premises, beyond the action they can take at diplomatic premises.

### *The Consular Bag*

12. Article 35 of the Vienna Convention on Consular Relations provides that, like the diplomatic bag, the consular bag shall not be opened or detained. However, there is a rider to this provision to the effect that, if it is believed that the consular bag contains prohibited articles, a request may be made for the bag to be opened in the presence of an authorised representative of the sending State. If this request is refused the bag shall be returned to its place of origin. This, again, gives a somewhat greater power to the police to prevent the abuse of the bag by the representatives of foreign States than is available to them in respect of the diplomatic bag.

### *Personal Baggage*

13. Under Article 36 (of the Vienna Convention on Diplomatic Relations) the personal baggage of the diplomatic agent (but not other staff) and members of his

family are exempt from inspection unless there are serious grounds for presuming that the baggage contains prohibited items. The problem here for the police concerns the interpretation of 'serious grounds'. Police would be entitled to act on specific information that a diplomat's personal baggage was likely to contain weapons or explosives, but it is unlikely that they would be able to include such baggage in exercising general precautions at times of a general threat to security, *eg* at an airport.

### *Immunity from Criminal Jurisdiction*

14. A diplomatic agent enjoys immunity from criminal jurisdiction under Article 31.1; similar immunity is extended to members of his family forming part of his household and administrative and technical staff, together with members of their families, by Article 37.1 and 2. There are limitations in respect of nationals and permanent residents. Members of the service staff of missions have limited immunity in respect of acts performed in the course of their duties by Article 37.3. Consular officers have similar limited immunity under Section 43 of the Consular Relations Convention.

15. In practice immunity from criminal jurisdiction is most frequently invoked in relation to traffic offences and in particular illegal parking where the provisions of the Convention prevent prosecution or the enforcement of fees payable.

16. An additional element in road traffic matters is that Article 22.3 provides that the means of transport of a mission shall be immune from search, requisition, attachment or execution and such immunity is extended to the private transport of diplomatic agents, administrative and technical staff and their families by Articles 30 and 37.2. Again the scope of the benefit is qualified for nationals and permanent residents.

17. The immunity from criminal jurisdiction under Articles 31 and 37 precludes in our view action against diplomatic vehicles which is penal in intent and effect. The removal of vehicles which are causing an obstruction is permitted but not wheelclamping.

18. Immunity from jurisdiction may be waived by the sending State (not by the entitled person) under Article 32.1, but the waiver must always be express. This means that the agreement of the sending State has to be obtained specifically for each stage of the criminal process, *eg* the interview by the police and the taking of statements, trial and the serving of any sentence. It is the usual practice to seek to ensure that the terms of the initial waiver cover all stages.

19. Although waivers have been successfully sought in a few serious cases, this is rarely a practical course since the agreement of the sending State is unlikely to be forthcoming and, if forthcoming, can only be obtained after a delay while the request is made through the diplomatic channel. This means that, for example when evidence of identity remains to be established or when there are time limits for the commencement of proceedings, the delay can prejudice the chance of a successful prosecution.

20. Under Article 31.4 immunity from jurisdiction does not exempt an entitled person from the jurisdiction of the sending State. States have sometimes agreed, when refusing to waive immunity, to consider prosecution on receipt of the available evidence.

21. While it is unusual for immunity to be waived or for a sending State to assume jurisdiction, on the basis of the seriousness of an offence and the strength

of the evidence, the Foreign and Commonwealth Office may take a range of actions which can result in the recall of the diplomat or a warning that such action will be taken if further infringement of the law is reported. Since cases have not been proved in the courts the problem is to ensure that the evidence is sound and cannot be discredited. However, unless possible witnesses are identified at the scene of the alleged offence and statements are available, it is often the case that evidence is deficient. This is particularly true in drink/drive cases when the normal charge in the absence of immunity would be under s.6(1) of the Road Traffic Act 1972 for driving or being in charge of a motor vehicle with alcohol concentration above the prescribed limit; but as an entitled person can be breath-tested only with his head of mission's consent, there is insufficient evidence for strong action unless there is corroborated evidence of driving when under the influence of drink contrary to s.5(1) of the 1972 Act.

22. In all cases in which it can reasonably be assumed that, in the absence of immunity, proceedings would have been instituted, the Home Office's practice is to provide the Foreign and Commonwealth Office with the best available evidence.

**Question (b).** *What are the institutional arrangements for co-ordination between the Home Office and the Foreign and Commonwealth Office in this area and are any changes envisaged following the events in St James's Square?*

23. So far as any abuse of the Vienna Convention is concerned, there is regular and constant exchange of information between relevant officials of the Home Office and the Foreign and Commonwealth Office both on general matters and specific incidents. The police are under instruction to report to the Home Office the facts of any case where it has been established that a person who has been reported for an offence is entitled to immunity. The Home Office considers such reports and will consult with the police about the sufficiency of the evidence with a view to ensuring that a case is presented in its entirety. The Home Office must also be satisfied that, in the absence of immunity, criminal proceedings would have been instituted. The Home Office will then transmit the evidence to the Foreign and Commonwealth Office for appropriate action to be taken; in a serious case action can take the form of a request for a waiver of immunity or for withdrawal. There is close consultation between the Home Office and Foreign and Commonwealth Office officials on the action to be taken on any case. Arrangements for swift contact out of office hours exist through the system of Home Office duty officers and FCO Resident Clerks, who are able in emergencies to contact appropriate officials at their homes. These arrangements are kept under close review and are examined carefully in the light of particular incidents such as that in St James's Square.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 56-9)

On 20 June 1984, the Foreign Affairs Committee took evidence on the above subject from, *inter alios*, Sir Antony Acland, Permanent Under-Secretary of State and Head of the Diplomatic Service, Sir John Freeland, Legal Adviser, Foreign and Commonwealth Office, and Mr Eustace Gibbs, Assistant Under-Secretary of State, Foreign and Commonwealth Office, Vice Marshal of the Diplomatic Corps and Head of Protocol Department. The following is an extract from the proceedings:

[Q. 13.] This may not be a fair question for you but Article 22 of the Convention is very firm as to the inviolability of the premises of a mission.

It also, in that Article, sets out the special duty of the receiving state to take all appropriate steps to protect the premises of the mission and the words, I think, that are used are, 'against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.' Have you any views, taking into consideration what you would like a receiving country if possible to adopt as far as a British mission overseas is concerned, what a receiving country should do to prevent disturbance or impairment of the dignity of the mission by dealing with demonstrators?

(Sir *Antony Acland*.) I think the essential thing is that demonstrations should be adequately controlled and policed so that there is no damage done physically or otherwise to the premises of the mission or to the people within that mission. In the case of the tragic St James's Square incident there were certainly enough police present. This is really a matter for the Home Office and Home Secretary but there were more than sufficient police to ensure that the demonstration was peaceful and the two groups of demonstrators were entirely separated by crush barriers and lines of police. I do not think in that case the peace of the mission within the mission or the impairment of its dignity really applied, this country having the tradition of freedom of demonstration. They obviously were not at all pleased that the demonstration was taking place outside either the building or the people in it and we would certainly hope that our premises abroad would be similarly protected and regrettably there have been many demonstrations in the past in front of British High Commissions most of which have been properly policed; some have got out of hand.

[Q. 14.] Your view would be, therefore, that there could be no complaint under Article 22(2) of the Convention as to the way in which we looked after the premises and prevented any disturbance?

(Sir *Antony Acland*.) This is very much a matter of judgment and missions, themselves, do from time to time make complaints and get in touch with the Foreign and Commonwealth Office but provided the mission is kept secure from physical attack and inmates secure from physical molestation, that probably fulfils the duty of the receiving state but perhaps Sir John would like to give a more legal interpretation of the Article 22.

(Sir *John Freeland*.) Perhaps I might say that it is indeed the case that this Article on the inviolability of mission premises was one to which a good deal of importance was attached at the Vienna Conference and which has proved a valuable safeguard in many ways, since there have been many more cases of attacks on embassies than there have of appalling damage as in the Libyan case inflicted from inside mission premises. The special duty to take all appropriate steps to protect mission premises is one which we have certainly invoked in cases of harassment of our missions abroad. As to the particular issue of whether we, in the United Kingdom, had done enough in the case of the events which led to the tragedy in St James's Square I would say yes. I know no reason for taking the view that we did not take the appropriate steps to protect the premises.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 21-2)

[Q. 17.] There appears to be, looking at the report you gave, a difference of

opinion between states about the legality of screening diplomatic bags. Have you any views on that?

(Sir *Antony Acland*.) I would like a lawyer's answer on that and it is our view that the better legal view is that screening in certain circumstances could be permitted but Sir John could elaborate.

(Sir *John Freeland*.) This has been the subject of a good deal of argument. On the one hand, one can take the view that when the Convention says that 'the bag shall not be opened or detained' then something that falls short of physically opening it, *ie* some sort of external check not involving opening it, is not contrary to that obligation; that on the whole is the view that we think is, as Sir Antony said, the better one. On the other hand, a lot of states, and I know the Bulgarian Special Rapporteur in the International Law Commission which is looking at this question of the diplomatic bag, take the view that even though the words 'shall not be opened' do not expressly rule out screening, nevertheless any other technique for finding out what is inside the bag must be regarded as tantamount to opening. So, as I say, this is a vexed issue. Although we tend to the view which I have stated, we have not in practice screened or allowed our bags to be screened.

[Q. 18.] If in fact it could be argued that it would be a legal practice under the Convention, what considerations have persuaded Her Majesty's Government not to adopt such a practice, particularly at a time when really one had suspicions, as indeed one undoubtedly had suspicions about the Libyans, that their diplomatic bags were being used for improper purposes?

(Sir *Antony Acland*.) I think there are a number of general considerations relating to this. As the Foreign Secretary said in the House, we have to be satisfied that the security of our own communications, our own bags and legitimate contents in those bags, are maintained and preserved. That is one principle which one has to look at carefully, bearing in mind that whatever we do I am sure is going to be done reciprocally by other countries to us, by receiving countries, who are receiving our bags. I think the second very important consideration in these matters is whether in fact screening would be effective, or whether it would in fact be a sort of false form of security because of the ability nowadays, with various techniques, to conceal or screen from the screening the contents of the bag. I think one has to look very carefully at how it would affect our own interests and security of our own legitimate communications and also whether in the long term it would be actually an effective measure.

(*Ibid.*, p. 23)

[Q. 31.] Do you agree with the statement contained in Satow's Guide to Diplomatic Practice, 1979 Edition, page 117, paragraph 1430: 'The receiving state may subject a bag to detector devices designed to show the presence of explosives, metal or drugs, since this does not involve opening or detaining it'?

(Sir *John Freeland*.) I hope I made it clear in answer to an earlier question that although there is room for argument both ways on that, the view we tend to take is that that is correct.

[Q. 32.] . . .

Subject to the fact that obviously more work has to be done of a practical nature to see whether these things can be detected or can be hidden from detection, the law therefore is that you can search a Libyan bag if you want to and you can subject a Libyan bag to screening devices if you want to?

(Sir *John Freeland*.) Yes, but when you say 'the law is that' I would repeat that that is the view we take on a controversial question, and at the end of the day it might be for the International Court of Justice at any rate as between parties to the Optional Protocol (they do not include Libya); this question may fall to be determined by the International Court.

[Q. 33.] But Libya does not recognise the International Court?

(Sir *John Freeland*.) No.

[Q. 34.] Therefore, no action can be taken by Libya against us for opening or screening a diplomatic bag in the International Court until such time as they do recognise it?

(Sir *John Freeland*.) My point was that the more general question of screening and its compatibility with the prohibition on opening and detaining could fall to be determined by the International Court.

[Q. 34A.] Anyway, it comes to this, does it not, that the reason we do not screen and do not search Libyan diplomatic bags is a political decision rather than a legal one?

Chairman: Is that a statement or a question?

Mr Lawrence [a member of the Committee]: It was a question to which I got an assenting nod.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 25)

[Q. 35.] Could I return for a second to the diplomatic immunity of embassy buildings. Under what circumstances is diplomatic immunity withdrawn from buildings? Has it been done recently?

(Mr *Gibbs*.) We would not in normal cases withdraw immunity, that is to say, cease to regard a building as the premises of a mission, in the words of the Convention. The usual case which arises from time to time concerns a new building, or part of a new building, which we are asked to accept as being for the purposes of a mission, and hence grant it, in particular, rating relief. We quite often receive requests which we will either reject or query, usually on the grounds that the stated purpose of the premises, or part of a building, does not conform to the purposes of the mission, that is to say, it seems to us to be an office which has a commercial purpose, or a cultural purpose, which we would not accept as coming within the terms of the Vienna Convention.

[Q. 36.] Has the immunity of No. 5 St James's Square been affected by the break in diplomatic relations?

(Mr *Gibbs*.) The position of 5 St James's Square has been altered by the break in diplomatic relations. This is a legal matter and perhaps I should turn to Sir John. I believe the position to be that because the terms on which we broke the protection given to that building come more under the State Immunity Act rather than the Diplomatic Relations Act.

(Sir *John Freeland*.) That is not entirely so. If I may call attention to Article 45 of the Vienna Convention, that contains provisions expressly relating to the case which is the case here—a breach of diplomatic relations—and paragraph (a) of that Article provides that the receiving state must respect and protect the premises of the mission together with its property and archives. So there is a continuing duty on the part of the UK as the receiving state to respect and protect those premises. But that is of course a lower duty, if I may put it that way, than the terms of Article 22 which we were looking at earlier.

[Q. 37.] Is there any way by which diplomatic immunity can be withdrawn from No. 5 St James's Square, or is there going to be a Libyan embassy there for ever unless you hear from Libya?

(Sir *John Freeland*.) I am not quite sure what you mean by 'withdrawing diplomatic immunity'.

[Q. 38.] Do you regard it as diplomatic premises still?

(Sir *John Freeland*.) Yes.

[Q. 39.] When are you going to stop that, if at all?

(Sir *Antony Acland*.) They are unoccupied diplomatic premises. I do not think it would follow from that that the Libyans would necessarily be given permission to use those premises again for the purpose of having a mission there, and under the present arrangements we are insisting that the interests section of the Libyan Government in Saudi embassy should operate somewhere other than in St James's Square, but the building now remains, as we consider it to be, diplomatic premises under the protection of the Saudi protecting power with Article 45(a) applying, so the answer is that they will remain diplomatic premises until such time as the Libyans decide they want to dispose of them and no longer use them for diplomatic purposes.

...

[Q. 40.] In paragraph 28 of your memorandum you say: 'Some states interpret the wording of Article 45(a) as meaning that the premises of a mission continue to be inviolable even after a break in diplomatic relations. We do not share this view.' Can you tell us which states consider the premises of the mission in St James's Square to be inviolable after the break in diplomatic relations, and do they include Libya and Saudi Arabia as protecting power, or other states, and have they complained to you about the search of the Libyan premises?

...

(Sir *John Freeland*.) This is not a proposition about states taking a view as to the St James's Square premises but states taking a view about the effect of Article 45(a) generally; in other words, taking the view that the duty comprised in the paragraph I read out earlier reaches as high as requiring the premises to be treated as inviolable after a break in relations. We do not take that view, as indeed we made clear in practice by the search we carried out after the evacuation of the premises.

[Q. 41.] I understand that. The point the Committee would like to know (it may be a matter of note) is whether any states put on record to us after the search their difference of view on that matter. Could we have a note on it?

(Sir *Antony Acland*.) I am not aware of any state having done it, but we will check it. The question really turns on the words 'respect and protect the premises of the mission'. We have a duty to respect and protect the premises in St James's Square, but we do not interpret those words as precluding search and the inviolability aspect of Article 22.

(Sir *John Freeland*.) I think the only people who did raise objection were the Libyans themselves.

...

[Q. 44.] In paragraph 27 of your memorandum to us you suggested there is no course of action open to you in the event of a diplomat breaching Article 42, by engaging in business activities, between doing nothing and declaring him or her *persona non grata*. You can either do nothing or declare him *persona non grata*. Can you not complain to a head of a mission in such circumstances?

(Sir *Antony Acland*.) Yes, one can indeed; that is done, not only in relation to a breach under Article 42. If it were a very clear breach but under other offences, driving offences, drunken driving, or other activities, improper, illegal activities by a diplomat, the practice would be that in nearly every case the breach would be brought to the attention of the head of the mission by the Vice-Marshall of the Diplomatic Corps, by the Head of our Protocol Department, and if it were a persistent breach, it could be suggested that that person should be withdrawn and at the end the ultimate sanction, as paragraph 27 says, and we have the ultimate sanction under Article 9 of the [Vienna] Convention, would be to declare someone *persona non grata*. There is a whole host of gradation of activity you can take to try to ensure the proper observance of the Vienna Convention. . . .

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 25-7)

In reply to a question on the subject of an incident in Israel, the Minister of State, Foreign and Commonwealth Office, wrote:

Her Majesty's ambassador in Tel Aviv has delivered a formal protest to the Israeli Ministry of Foreign Affairs about the incident on 19 June involving the British defence attaché and the Israeli police. This made clear that, contrary to the allegations by the Israeli police, the car in which the defence attaché was travelling that morning had at no time left public roads and that he had not entered any militarily restricted area nor taken any photographs of military installations. The ambassador has registered our strong concern at the unjustified treatment of the defence attaché, especially in view of his diplomatic status and the fact that he had committed no offence.

(HC Debs., vol. 62, Written Answers, col. 331: 25 June 1984)

In reply to a question on the subject of serious offences committed by foreign diplomats, the Secretary of State for Foreign and Commonwealth Affairs wrote:

Offences of this kind are invariably brought to the attention of the head of mission. In the more serious cases we require either a waiver of immunity or the removal of the offender from this country. In addition, heads of mission have been specifically reminded that we take a very grave view of drunken driving offences, failure to take out third party insurance and offences against firearms laws. We also have the sanction of declaring a diplomat *persona non grata* under article 9 of the Vienna convention.

(*Ibid.*, vol. 63, Written Answers, col. 110: 3 July 1984)

In reply to an oral question, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

. . . diplomatic missions are well aware that their immunity does not in any way absolve them from the responsibility to comply with planning and listed building consent regulations and building by-laws. The Vice-Marshall of the Diplomatic Corps reminded heads of missions of this in a circular letter last year. There is therefore no need for a review.

Later, the Minister of State added:

The answer I have given in my original reply indicates that diplomatic missions are subject to planning laws and building regulations, and indeed if there were to

be a breach of planning permission by diplomatic missions we would protest to the head of the mission, had there been a breach in the law, and we would insist that the breach was rectified.

(HL Debs., vol. 454, col. 406: 5 July 1984)

The Secretary of State for the Home Department, Mr Leon Brittan, made the following statement in the House of Commons on the subject of an attempt on 5 July 1984 to abduct Mr Umaru Dikko:

The Metropolitan Police were informed yesterday at 12.40 pm of the suspected abduction of Mr. Umaru Dikko, a Nigerian living in this country who was formerly a member of the Government of Nigeria. The call to the police, by his personal assistant, Miss Elizabeth Hayes, said that at about 12.25 pm he had been taken away in a van after a struggle.

Because of the possibility that attempts might be made to remove him from this country a special watch was mounted at ports. As a result suspicions were aroused by two large crates which arrived at about 4 pm at Stansted to be loaded on to a Nigerian Airways cargo aircraft. The crates were not diplomatic bags as defined by the Vienna convention. The crates were accordingly opened. I understand that members of the staff of the high commission were already at Stansted and a Mr. Edet was invited to inspect the crates. Two people were found in each crate. One crate contained Mr. Dikko, who was unconscious, and another man who was conscious and in possession of drugs and syringes. The other crate contained two men, both conscious. Mr. Dikko is now recovering satisfactorily under police guard in hospital and will be questioned as soon as he is well enough. A total of 17 people, including the remaining three found in the crates, were arrested by the police and are being questioned. None of those arrested has claimed diplomatic immunity.

My right hon. and learned Friend the Foreign and Commonwealth Secretary summoned the high commissioner for Nigeria to see him at 9 am this morning and told him that he took a most serious view of the incident. The high commissioner undertook to convey to his Government a report of the meeting. He denied any high commission or Nigerian Government involvement in the incident. The Foreign Secretary said that he expected the fullest co-operation from the Nigerian high commissioner, including the waiver of diplomatic immunity if that were necessary for the purpose of ensuring justice.

(HC Debs., vol. 63, col. 609: 6 July 1984)

Later in the debate, asked whether there was any more information about the documentation accompanying the crates, the Secretary of State replied:

Yes. The crate was addressed to the Ministry of External Affairs, Lagos, from the Nigerian high commission, London, but it was not accompanied by an official document showing the status of the courier and the number of packages constituting the diplomatic bag, nor did it have the other markings of the diplomatic bag as such.

The House will recollect that when I answered questions on the Libyan affair a contrast was drawn between the diplomatic bag and personal baggage, and the different degree of protection accorded to both. It was clear that this was not a

diplomatic bag although it purported to emanate from the high commission. I deliberately used the somewhat legalistic and pompous word 'purported' because, of course, it is the subject of investigation.

(HC Debs., vol. 63, col. 616)

In the course of a further debate on the subject of the abduction of Mr Umaru Dikko, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

It should be emphasised that no one is more affronted by abuses of diplomatic immunity than those diplomats, including our own, who rely upon that immunity for the proper conduct of their affairs and business. A grave matter arises when events take place which represent a violation or disregard of article 41 of the Vienna convention, which states that it is the duty of all persons enjoying privileges and immunities under that convention to respect the laws and regulations of the receiving state. That is a plain statement of duty and of the highest importance.

(Ibid., col. 706: 9 July 1984)

A further memorandum, dated 16 July 1984, was submitted to the Foreign Affairs Committee of the House of Commons by the Foreign and Commonwealth Office. The following extracts are taken from this document:

**Question 2.** *Which States, if any, recorded any kind of objection to the United Kingdom's searching of the Libyan Mission premises after the break in diplomatic relations? Which are the States referred to in paragraph 28 of your memorandum as regarding the premises of such a mission to be inviolable?*

Only Libya objected to this. We have no record of which States interpret the wording of Article 45a of the Vienna Convention as meaning that the premises of a mission continue to be inviolable even after a break in diplomatic relations; but we know, for example, that the Government of South Korea hold this view.

...  
**Question 8.** *Paragraphs 19 to 28 of your Memorandum indicate 10 areas of ambiguity in the Convention. In the Memorandum and in your oral evidence, you indicate the difficulties in amending the convention: is consideration being given to seeking international acceptance to a supplementary clarifying protocol to resolve the ambiguities?*

The ten provisions listed in paragraphs 19 to 28 of the Memorandum are not all areas of ambiguity in the Convention. The Committee in question 14 also asked about provisions regarded by HMG as raising particular problems of implementation. The comments on Article 3(e), 22.2, 36.1, 42 and 45(a) were based on the practical difficulties of implementation encountered by FCO Protocol Department in their day to day experience of implementing the Convention. As regards the other Articles listed which either contain ambiguities or have required the development of supplementary interpretative practice, the position needs to be considered for each separately.

The question of screening of the diplomatic bag (Article 27.3) is already under discussion by the International Law Commission and a supplementary agreement is likely to emerge as a result of further international discussion. The Committee will be aware from the written evidence submitted by Sir Ian Sinclair of the

progress of the work of the International Law Commission in this area. Article 25 is indeed uncertain in its extent. It is not among the provisions scheduled to the Diplomatic Privileges Act 1964 as it was not thought to require any specific derogation from the ordinary law of the UK. To suggest a clarification would be likely to lead to various demands for specific facilities which would be difficult or expensive to provide—such as assistance in finding accommodation or additional parking facilities.

As regards Article 31.1(a) and Article 34(b) the Foreign and Commonwealth Office were principally concerned in the early years of application of the Convention (during which the problem was extensively studied by our legal advisers) with the overall financial implications. Since we maintained a large overseas estate, we would, on balance, have suffered considerable financial loss had a restrictive application of Article 34(b) been accepted. Although not all countries resolved the ambiguity in the same way, we have in fact almost always been able to secure relief in other countries from property taxes on residences of our diplomats, although in some cases this has depended in part on reciprocity. There would therefore be no overall financial advantage to the UK by seeking to re-open Article 34(b). We are not aware that Article 31(1)(a) has caused practical difficulties to plaintiffs. The view of our legal advisers<sup>1</sup> would be that it would seem in principle the better view that the courts of the receiving State should be entitled to exercise normal jurisdiction in respect of principal private residences. To re-open the provision might result in a contrary view receiving majority acceptance.

As regards Article 37.1, it would have been preferable if a definition of the term had been contained in the Convention. The UK practice is:<sup>2</sup>—

‘The Government of the United Kingdom, in administering privileges, interpret the expression “member of his family forming part of his household” as including the spouse and minor children, and certain other persons in exceptional circumstances. Minor is construed in accordance with United Kingdom law as meaning a child under 18. There are no fixed rules in regard to the additional persons, but in practice they fall into three categories:—

- (a) a person who fulfils the social duties of hostess to the diplomatic agent (for example the sister of an unmarried diplomat or the adult daughter of a widowed diplomat);
- (b) the parent of a diplomat living with him and not engaged in paid employment on a permanent basis; and
- (c) the child of a diplomat living with him who has attained majority but is not engaged in paid employment on a permanent basis. Students are included in this category provided that they reside with the diplomat at least during vacations’.

This practice was elaborated in the early years of application of the Convention in the light of UK interests and experience. Should this provision be re-opened we would seek to reflect it in the Convention, but there might well be pressure for a more extended definition of the term which would increase the number of persons entitled to immunity.

<sup>1</sup> Denza ‘Diplomatic Law’ pp. 156–159.

<sup>2</sup> Denza ‘Diplomatic Law’ p. 225.

As regards the definition of 'permanently resident' in Article 38.1 where the Committee are already aware of consistent UK practice, there has been no challenge over these general principles. We should seek to reflect them if the provision were re-opened, but there could be no guarantee that we would succeed and no obvious advantage to the UK even if we did.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 84-7)

On 18 July 1984, the Foreign Affairs Committee of the House of Commons took evidence from the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe. The following is an extract from the proceedings:

134. . . . The first question we would like to examine today is the matter of the Vienna Convention and diplomatic immunity. I would be glad if you could make a statement to bring us up to date on your consideration of this matter.

(Sir *Geoffrey Howe*.) Chairman, thank you very much. I will begin, if I may, by saying that this does obviously provide a useful opportunity for me to discuss with you the question of international terrorism and the abuse of diplomatic immunity. The Libyan and Nigerian affairs have created great disquiet in this country. Your own work will have shown you, I think, that this is not only a serious but a complex subject. There are no across-the-board solutions. I particularly want today to identify some of the problems which I find most difficult and on which I would welcome your advice in due course.

Can I first say a word about the relationship between diplomatic immunity and the wider problem of international terrorism? Diplomatic immunity does not stand by itself or exist for its own sake. It is part of the system by which governments conduct their relations with one another. It is an essential instrument in safeguarding the livelihood as well as the physical safety of British citizens, as well as Britain's economic interests, overseas.

Abuse of diplomatic immunity can arise in quite ordinary day-to-day circumstances or it can be part of the broader problem of international terrorism. There are two aspects of this: First, some foreign nationals to whom this country has given hospitality have taken to pursuing on our soil conflicts which have little to do with the policies of the British Government or the activities of British citizens; second, more recently, a small minority of governments have used their diplomatic missions abroad to support and foster terrorism.

Under the law of this country, the fact that the intended victim may be a foreigner does not alter the seriousness of the offence. Foreigners resident in this country are entitled to the protection of our laws in the same way as British citizens. In the same way the existence of diplomatic immunity certainly does not confer on a foreigner the right either to break the law of this country or to put at risk the lives or property of British citizens or of visitors to this country. As you know, that is plainly stated in Article 41(1) of the Vienna Convention, which requires diplomats to 'respect the laws and regulations of the receiving state.'

But in cases where diplomatic immunity is claimed, those principles cannot be upheld by the courts of the host country.

That brings me to what is probably the most important point. The justification for that exceptional privilege has to be considered in the context of the absolutely crucial concept of reciprocity.

If British diplomats are to enjoy immunity overseas, then it is necessary to accord matching rights to foreign diplomats in this country. And it is vitally important for our diplomats to enjoy that immunity for the sake of British interests and for the safety of non-diplomatic British subjects.

(*Ibid.*, pp. 44-5)

The last matter of substance on which I should like to say something is the diplomatic bag. As the Committee well knows, the Vienna Convention states that 'the Diplomatic Bag shall not be opened or detained'. In our view, this does not prevent the scanning of bags electronically, although this interpretation is not universally accepted. But, because contents—even guns—can be disguised by a determined government, we shall not be able to establish beyond reasonable doubt by scanning what the contents of a particular bag are. Scanning might sometimes tell us that there is a problem. But it would not solve it.

(*Ibid.*, p. 46)

The questions then turned to the Dikko incident at Stansted Airport.

139. As I understand it, there are two reasons why we searched the crates, one because it was incorrectly marked and the other because it had no courier?

(*Sir Geoffrey Howe.*) There was a third reason. If the Customs and Excise or any other authority had reason to suspect that the crate contained a human being they would consult the Foreign and Commonwealth Office who would, in such circumstances, whatever the labelling, authorise such action as was necessary in the circumstances. That is actually what happened in this case.

140. Suppose that had not happened, the third, and it was just a question of the mismarking or the non attendance of a courier: firstly, some diplomatic bags do not have couriers, do they? They are the ones that end up in the freight compartments of an aeroplane, so it is not necessary for a diplomatic bag to have a courier?

(*Sir Geoffrey Howe.*) It does not have to have a courier with it all the way, they are normally delivered by a courier.

141. Can I refer you to the memorandum of the 16th July which you presented to the Committee and the first question we asked there: 'What information does the FCO record about the size and weight of diplomatic bags received in this country?' and you spoke firstly about diplomatic bags in the care of diplomatic couriers or airline pilots and secondly of unaccompanied bags travelling as air freight, so presumably the unaccompanied bags do not need a courier?

(*Sir Geoffrey Howe.*) That is right, yes.

142. As to those that are not accompanied by a courier what is the marking that ought to have been put if the Vienna Convention was being followed by the Nigerians on that crate? We know that there was suspicion about the marking that was, in fact, put there—what was the marking that was on it and what was the marking that ought to have been on to satisfy the customs officer?

(*Sir Geoffrey Howe.*) As I understand it on this crate there was the addressee and originator recorded. It did not have on it any additional legend proclaiming its diplomatic status, nor did it have a seal. Those are the things which would

normally have been present in addition, as the Home Secretary said, the accompanying courier was not suitably equipped.

143. There was a courier but he was not suitably equipped?

(*Sir Geoffrey Howe.*) There was a courier in evidence. The documents were not available or furnished.

144. One of the people charged in connection with the kidnapping is a Nigerian diplomat. Could you tell the Committee what immunities, if any, he possessed and whether any waiver was required before he was charged?

(*Sir Geoffrey Howe.*) He was a member of the Nigerian Government service but he did not have any diplomatic status in this country. No waiver was required.

145. He is not a Nigerian diplomat?

(*Sir Geoffrey Howe.*) He was travelling on a diplomatic passport and he was a member of the Nigerian Government Service but he had no diplomatic status in this country.

146. Because he was not a member of the mission?

(*Sir Geoffrey Howe.*) That is right.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 48)

151. . . . there have been a lot of people outside the South African Embassy recently and the Vienna Convention Article 22(2) refers to: ' . . . the receiving state having the duty to preserve the peace and dignity of the mission.' I wonder if you could tell us what part did the FCO play in the decision at the end of May to increase the restrictions on demonstrations outside South Africa House? Do the increased restrictions represent a general policy of tightening up in the area of protection of Embassy premises? I just ask this question because it is relevant to the demonstration which was outside the Libyan Embassy last May.

(*Sir Geoffrey Howe.*) Well, I would need notice of that question because primarily, of course, it is a matter for the police authority and the Home Office and I cannot help you on that matter.

(*Ibid.*, p. 49)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We would request a waiver of the immunity or the removal of any diplomat accused of hard drug offences, provided that the evidence was sufficient.

(*HC Debs.*, vol. 64, Written Answers, col. 504: 23 July 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

It has been our practice to request waivers of immunity in respect of Commonwealth and foreign diplomats in London accused of serious criminal offences except in cases, such as first-time alleged shoplifting or drunken driving offences, where we have considered that disciplinary action by the head of mission would be more appropriate. If the waiver is not granted, we have required the removal of the offender. [The Secretary of State for Foreign and Commonwealth Affairs] covered this point in his statement of 18 July to the Select Committee on Foreign Affairs, a copy of which has been placed in the Library of the House. He announced that we would expect, and apply, more stringent standards in future.

If a waiver is requested of the immunity of a British diplomat overseas accused of a serious offence, we consider the matter carefully, having regard among other matters to strength of the evidence, the diplomat's own account of the matter and the likelihood of a fair trial. In some cases we have granted waiver of immunity. There would be serious difficulties, however, in committing ourselves in advance to a waiver in all cases. It is, moreover, unlikely that a proposal for mutual waiver in all cases would find favour with most Commonwealth Governments.

(Ibid., cols. 702-3: 25 July 1984)

By letter dated 25 July 1984, Sir Geoffrey Howe furnished the Foreign Affairs Committee of the House of Commons with the following additional information:

Q139 . . .

As to the adequacy of the labelling, Article 27.4 of the Vienna Convention states that 'the packages constituting the diplomatic bag must bear visible external marks of their character . . .'. Under general international practice there are two visible external marks: firstly, a seal in wax or lead marked with the official stamp by the competent authority of the sending State or the diplomatic mission, and secondly a tag or stick-on label identifying the contents. The label on the crates contained details of the addressee and the sender, but there was no official seal. At no stage did the member of the Nigerian High Commission assert that the crates constituted a diplomatic bag.

The suspicion on the part of the Customs and Excise officers that the crates contained a human being was the reason for their wish to search them. Had there been no reason for any suspicion whatsoever they would not have been opened as a routine matter any more than is the case with ordinary freight. Whether the crate constituted a bag within Article 27 of the Vienna Convention and whether there was an accompanying courier (who might have claimed that the crate constituted a diplomatic bag if this had been the case) were relevant factors in deciding whether there was in law an immediate right of search. But I sought in my evidence to emphasise that the advice given, and the advice which would have been given had the crate constituted a diplomatic bag, took fully into account the overriding duty to preserve and protect human life.

Q140 . . .

Not all diplomatic bags, either British or foreign, are accompanied by couriers. The presence of a diplomatic courier who might have been provided with an official document indicating his status and the number of packages constituting the diplomatic bag in accordance with Article 27.5 of the Vienna Convention was considered of relevance because such a person would clearly have insisted that the crate constituted a diplomatic bag if this had been the case.

Many incoming foreign diplomatic bags are not accompanied by a courier on the flight, but are collected from the aircraft by a representative of the diplomatic mission provided that they are clearly identified as diplomatic bags. Otherwise they are regarded as ordinary air freight and would go through customs procedures. Articles for the official use of the mission are exempt from customs duties under Article 36.1 of the Vienna Convention and their entry is obligatory. But there are no provisions in the Convention requiring *export* of ordinary diplomatic freight where it does not constitute a diplomatic bag.

Q143 . . .

Mr Oken Edet, who was in charge of the crates when they arrived at Stansted Airport, was notified to us as an attaché in the Nigerian High Commission. He had on occasion been used as a diplomatic courier. But he did not, on 5 July, have the official document described in Article 27.5 of the Vienna Convention, and the Foreign and Commonwealth Office were told that he was not intending to travel on the flight on which the crates were to be loaded.

[Q151]

As I said, this is primarily a matter for the Home Office and the Police. But it might be useful to the Committee if I confirmed that the demonstrations were moved from immediately outside South Africa House to the side of the Embassy in Duncannon Street, because the police considered that the requirements of Articles 22(2) and 29 were not being met.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 50-1)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The numbers of people accredited in London and entitled to full diplomatic immunity from criminal jurisdiction are as follows:

	Numbers
Diplomatic staff of diplomatic missions	2,309
Administrative and technical staff of diplomatic missions	2,147
Diplomatic staff of the Commonwealth Secretariat	60
High officers of international organisations	11
Consular officers and employees of the Polish consulate-general (Cmd. 7372 of 1978)	9
Total	4,536

In addition, there are 306 members of the service staff of diplomatic missions who enjoy immunity in respect of acts performed in the course of their duties, under article 37.3 of the Vienna convention on diplomatic relations; 314 officers and servants of the Commonwealth secretariat who under the Commonwealth Secretariat Act 1966 have immunity from suit and legal process in respect of acts or omissions done in the course of the performance of official duties (but this immunity does not extend to motor car accidents or motor traffic offences); 1,216 officers and servants of international organisations who have immunity from suit and legal process in respect of things done or omitted to be done in the course of the performance of their official duties, under the International Organisations Act 1968; and 249 consular officers and consular employees in London who under article 43 of the Vienna convention on consular relations are not amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.

(HC Debs., vol. 64, Written Answers, cols. 867-8: 27 July 1984)

In criminal proceedings arising out of the Dikko incident, one of the accused, Mr Mohammed Yusufu, claimed diplomatic immunity. The following certificate, dated 30 July 1984, was issued by the Foreign and Commonwealth Office:

Under the authority of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs conferred on me in accordance with the provisions of Section 4 of the Diplomatic Privileges Act 1964, I, Eustace Hubert Beilby Gibbs, Head of Protocol Department of the Foreign and Commonwealth Office, hereby certify that the Secretary of State has received no notification of the appointment of Mr Mohammed Yusufu as a member of the staff at the Nigerian High Commission.

(Text provided by the Foreign and Commonwealth Office)

The Permanent Under-Secretary of State, Foreign and Commonwealth Office, and Head of the Diplomatic Corps, Sir Antony Acland, addressed the following notice, dated 15 August 1984, to the Heads of all diplomatic missions in London:

As Heads of Mission will be aware, there have been some very serious incidents in this country in recent months, involving abuse of diplomatic immunity. There is also a good deal of evidence of widespread breaches of the law during the past few years by members of the diplomatic community in Britain. Her Majesty's Government are very concerned about these developments. Their views were set out most recently in a statement by the Foreign and Commonwealth Secretary, Sir Geoffrey Howe, to the Foreign Affairs Committee on 18 July. I enclose a copy. The statement makes it clear that the Government have been considering what changes should be made to existing policies in response to these developments.

It is of the utmost importance, and in everybody's interest, that there should be no infringement of British laws by the staff of diplomatic missions and consular offices in this country, and that abuse of diplomatic immunity should cease. As Sir Geoffrey Howe made clear in his statement, we recognise that only a very small minority of the Diplomatic Corps abuse their status. He is confident that the great majority support the efforts of HMG to put an end to such abuse. Nevertheless, the record shows that there is scope for considerable improvement. HMG accordingly looks to all Heads of Mission for their cooperation in ensuring that their staff respect British law and observe the highest standards of diplomatic behaviour.

Heads of Mission will wish to know that HMG will now be expecting and applying more stringent standards in respect of behaviour by the staffs of missions on the lines set out in Sir Geoffrey Howe's statement. May I draw your attention to the following points of particular concern:

- (a) serious offences: HMG wish to achieve a rapid and sustained reduction in the number of these offences. We shall need your cooperation in waiving immunity or arranging for the withdrawal of any members of your staff who may be responsible for such offences in the future;
- (b) the import, export or possession of firearms by persons who have not obtained a firearms certificate. This is expressly forbidden by British law;

- (c) size of missions: there may be cases where the size of missions is larger than is necessary for, or consistent with, their role;
- (d) diplomatic premises: diplomatic status may have been claimed for some premises where it is not fully justified;
- (e) diplomatic bags: these may contain only diplomatic documents and articles intended for official use. They may not be used for imports or exports which are contrary to United Kingdom laws and regulations, regardless of any claim that the items may be intended for official use.

This is an area of great, and growing, public concern. I must accordingly invite Heads of Mission to review their procedures in these and all other respects, in order to ensure that all members of their missions observe strictly the provisions of the Convention, and in particular their duty to respect United Kingdom laws.

I should be grateful if you would bring this notice to the attention of all your staff.

(Text provided by the Foreign and Commonwealth Office)

In reply to a question, the Parliamentary Under-Secretary of State, Home Office, wrote:

As a party to the Vienna convention on diplomatic relations, the United Kingdom cannot, without international agreement, limit the immunity from criminal jurisdiction which diplomatic agents and certain other staff of missions enjoy. However, as part of the review of the convention which my right hon. and learned Friend the Foreign and Commonwealth Secretary announced earlier this year, the Government are assessing the scope for taking firmer action in respect of breaches of the criminal law by those entitled to diplomatic immunity.

(HC Debs., vol. 65, Written Answers, col. 436: 22 October 1984)

In the course of a statement on 9 November 1984 in the Sixth Committee of the General Assembly of the United Nations deliberating upon the report of the International Law Commission, the United Kingdom representative, Sir John Freeland, turned to the topic of the diplomatic courier and diplomatic bag. He observed:

Mr Chairman, the topic is one in relation to which we have in previous years expressed misgivings. We have doubted the usefulness of constructing elaborate new provisions in this field, given the existence of a substantial body of principles in existing multilateral conventions and of relatively clear international practice supplementing them. Having studied the work carried out by the Commission this year, however, we are encouraged by the extent to which it shows sensitivity to the realities of the situation. The Report shows an awareness of the growing problem of abuse of the diplomatic bag. It also demonstrates that there exists a realistic appreciation among the Commission's members of the danger that over-elaborate provisions or provisions conferring new immunities on the bag and the courier would not be acceptable to governments. It is our hope that concerns of this kind will be in the forefront of the Commission's thinking as it tackles the problems which remain unresolved.

In this connection we welcome the Special Rapporteur's reiteration, as recorded in paragraph 154 of the Report, of the intention to apply the functional approach throughout the draft. Consistently with this approach, the Commission has introduced significant limitations of the privileges and immunities proposed in the earlier draft. We also agree with the Commission's decision to delete unnecessary provisions in draft Articles 9, 12, 20, 22, 26 and 27. These deletions bring the provisions on the status of the courier closer to what states are likely to accept as having to be accorded for the purpose of safeguarding the security of the bag. They also bring those provisions closer to what can be guaranteed by national authorities without the establishment of complex new administrative machinery.

We consider it particularly important, Mr Chairman, that there should not be requirements for new immunities to be given to the courier, going beyond what can be justified by the functional need to protect the bag. We welcome as realistic the omission from paragraph 1 of what is now draft article 16, on the personal protection and inviolability of the courier, of the provision exempting the courier from personal search by electronic screening. Such a provision would have run counter to the existing general practice whereby diplomats and others entitled to full inviolability submit without question to pre-flight screening in the interests of aviation security. Also in the context of draft article 16, we note with satisfaction the statement in paragraph (5) of the commentary that '... it should be understood that the principle of the courier's inviolability does not exclude in respect of him either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences'. This understanding is, we think, one which may require a wider application.

On the other hand, we have doubts, on grounds of functional need, about draft article 17, dealing with the inviolability of temporary accommodation, notwithstanding the various qualifications which it contains. We also have doubts about draft article 20, on exemption from dues and taxes. Similarly, we doubt the need for draft article 23, on immunity from jurisdiction—particularly its paragraphs 1 and 4. As regards its paragraph 1, which would require the courier to be accorded immunity from criminal jurisdiction, we see force in the argumentation summarised in paragraph 190 of the Report. We agree that such a requirement seems superfluous and functionally unnecessary. The counter-argument that the grant of such immunity is justified because the courier is an official agent of the sending State does not seem to us persuasive. Nor does any rationalisation of that counter-argument on the basis, which we have heard suggested in this debate, that respect for the sovereignty of the sending State requires that the immunity be granted. Here, as in other aspects of the draft articles, sight should not be lost of the fact that two sovereignties are involved—that of the receiving or transit State as well as that of the sending State, and in this case the former sovereignty is the more immediately affected. The qualification of territorial jurisdiction which the grant of immunity would entail requires, in our view, to be justified on the basis of functional need.

Perhaps I might add, Mr Chairman, before turning from draft article 23, that when I read this part of the Report I was struck by a passage at the end of paragraph 191. This passage records the view that the courier should be accorded 'a degree of immunity in accordance with his dignity and the importance of his functions' (a form of words which, incidentally, seems to me to have rather an old-fashioned ring and to be more appropriate to an Ambassador than to a courier). It

then goes on to say that 'Abuses of legal norms, including those on privileges and immunities, had existed in the past and aroused justified concern. But the task of the Commission was to place itself above the over-dramatization of, and the over-reaction to, some recent events and to prepare drafts endowed with the objectivity and the adequate perspective which could only be given by a dispassionate and serene analysis.' I am not sure that I understand what exactly is meant by the reference here to 'the over-dramatisation of, and the over-reaction to, some recent events'. Leaving that aside, I of course agree on the need for the Commission to adopt an objective approach based on dispassionate analysis. I question, however, whether serenity is the appropriate state of mind when some recent events involving abuse of immunity are under consideration. I will revert to the problem of abuse when I comment later on draft article 36.

Mr Chairman, I should like before that to say that the work done by the Commission on the identification of the bag seems to us to be on the right lines. We shall be studying the Commission's draft closely, but we believe that the Commission correctly accepted that the essential purpose of the identifying marks is to provide an indication of authenticity. The official seal and the label showing the origin and destination of the bag are the best proof that the authorities of the sending State have given to a particular pouch or container the character of a diplomatic bag and have discharged their responsibility to control its contents. Little purpose would, we think, be served by requiring additional information such as a description of contents or limits on weight or size. There is little reason to suppose that limits on weight or size are effective as a deterrent to abuse and accordingly no good ground for imposing them by multilateral agreement.

Mr Chairman, we have studied with great interest the records of the Commission's initial debate on draft articles 36 to 42 and, in particular, on draft article 36. The course of this debate showed a welcome degree of awareness of the concern aroused by abuse of bag facilities. It also showed an encouraging willingness to grapple with the difficult task of striking the proper balance between the legitimate rights and interests of the sending State and those of the receiving State. A number of ideas were suggested which clearly deserve further study. At a time when the Select Committee on Foreign Affairs of our own House of Commons and our Secretary of State for Foreign and Commonwealth Affairs have not yet concluded or published the results of their separate reviews of the Vienna Convention on Diplomatic Relations it would be premature for my delegation to express opinions on what the rules on the protection of diplomatic bags should be. Members of the Sixth Committee will know well that in the light of notorious incidents which have occurred in London in recent months we are acutely conscious of the reality and dangers of abuse of the diplomatic bag. We have called for international consideration of what measures can be introduced to prevent improper use of the diplomatic bag and my national authorities have been giving close study to the problem. There is cause for serious concern about the abuse of the diplomatic bag for such purposes as the illicit importation of guns, explosives and drugs and there is a widely felt need to find ways of checking such abuse. But, Mr Chairman, we are also acutely conscious of the general need for communications between a sending State and its overseas diplomatic posts to be protected and for governments in friendly relations to deal with one another on a basis of trust. There are some extremely difficult issues to be resolved here and we

are inclined to agree with those who have described draft article 36 as the key provision of the set of draft articles.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question whether the United Kingdom's diplomatic representatives abroad are permitted to give consent to the scrutiny of their diplomatic bags if requested, the Minister of State, Foreign and Commonwealth Office, wrote:

We would not permit such scrutiny to go beyond checking that the bags bear visible external marks of their character, in accordance with article 27.4 of the Vienna convention on diplomatic relations. We do not scan or X-ray incoming bags. The implications of changing this practice, which accords with that followed by virtually all other states, remain under review.

(HC Debs., vol. 67, Written Answers, col. 127: 12 November 1984)

Speaking in the Second Standing Committee on Statutory Instruments of the House of Commons, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Tim Renton, introduced the draft Consular Relations (Privileges and Immunities) (People's Republic of China) Order 1984, as follows:

The purpose of the order, which is to be made under the Consular Relations Act 1968, is to enable us to give effect to our obligations under the consular agreement concluded with the Chinese Government earlier this year. That agreement allows China to establish a Consulate-General in Manchester in return for a similar post which we wish to open in Shanghai for the more effective promotion of our export trade to that country.

The privileges and immunities accorded to foreign consulates in the United Kingdom are governed by the Vienna Convention on Consular Relations, the relevant provisions of which are scheduled to the Consular Relations Act. However, it can be agreed bilaterally, within the limits prescribed by the Act, that a higher scale shall be conferred. The present order provides that where we allow a Chinese consulate to be set up in this country, that post and the persons connected with it shall, on the basis of reciprocity, be accorded a level of immunity which approaches, though does not precisely match, the diplomatic scale. The effect of the order will be quite limited with regard to the number of Chinese officials. Under the terms of the consular agreement, the complement of the Chinese Consulate-General in Manchester may not exceed 10 consular officers and 20 employees.

Similar orders have been approved by Parliament in 1970 and 1978 for the purpose of implementing consular agreements concluded with the Soviet Union and other Communist countries. The order now presented will secure for our Consulate-General at Shanghai reciprocal benefits, notably in the field of immunity, which will be greatly to its advantage in furthering our commercial relations in China, and safeguarding the interests of British nationals in that country.

The consular agreement with China guarantees precise timetables within which the arrest of any of our nationals by the Chinese authorities must be notified

to our consul and within which the consul shall be given early and frequent access to the persons detained. As a result, both the consular section of our Embassy in Peking and the Consulate-General in Shanghai will be able to render assistance more promptly to people who find themselves in this unhappy situation. The increased standard of immunity conferred on a Chinese consulate by the present order is closely related to the provision on arrest, which I have just described, because unless our consular officers and staff are to enjoy a status which will enable them to carry out their duties without interference they will in turn be unable to give the necessary help to British nationals who may find themselves in trouble with the Chinese authorities.

(HC Debs., 1984-5, Second Standing Committee on Statutory Instruments etc., cols. 3-4: 21 November 1984)

After moving the approval in the House of Lords of the same draft Order in similar words to those set out above, the Minister of State, Foreign and Commonwealth Office, Baroness Young, replied to certain questions which had been asked during the debate. She stated:

The first question concerned whether all consuls-general of all countries in London have something near to diplomatic immunities and privileges. I can confirm that nearly all countries would have their consuls in London named on the Diplomatic List and they would therefore be entitled to privileges and immunities on the full diplomatic scale of the Vienna Convention on Diplomatic Relations. I can confirm that, as the order has said and as I have indicated, the cases are reciprocal.

The noble Lord then asked whether some countries have greater immunities and privileges than others. I can tell him that there are broadly three groups of countries. The first group contains most countries which have adopted the Vienna Convention on Consular Relations. There is a second group, which includes certain Western European countries and the United States, which has privileges and immunities slightly above the Vienna Convention on the consular relations scale. Thirdly, there are Communist countries where the consulates have privileges and immunities on the diplomatic relations scale or nearly so. The reason why there are different groups is that each case is considered separately and circumstances can vary. But I should like to confirm that the principle of reciprocity applies in all cases.

Finally, the noble Lord asked me into which group China might fall. It would be into the last group of the three that I have named. This would include Communist countries which, as this order indicates, have privileges and immunities on the diplomatic relations scale or very nearly so. I hope that that has covered the questions that have been asked.

(HL Debs., vol. 457, cols. 1508-12: 6 December 1984)

In December 1984 the Foreign and Commonwealth Office submitted to the Foreign Affairs Committee of the House of Commons a supplementary note in response to a letter from the Committee. The note read as follows:

## COMPENSATION

**Question.** (i) *What is the position of those seeking compensation, whether from insurance schemes (motor or otherwise) or the Criminal Injuries Compensation Board or elsewhere, for injuries or damage inflicted by a person entitled to immunity from prosecution?*

**Answer.** It was established in English law by the case of *Dickinson v Del Solar* (1930) 1 KB 376 that an insurer cannot take advantage of the privileged position of a diplomatic client to refuse to pay either on the ground that a waiver of immunity amounted to a breach of a condition in the insurance contract or on the ground that there was no legal liability giving rise to an obligation to indemnify. To avoid any further similar argument from insurers however the Foreign Office sought and obtained from all authorised motor insurers doing business in the United Kingdom an assurance that they would not attempt to rely on the privileged position of their diplomatic clients. In a circular of 1958 diplomatic missions in London were reminded of their obligation to take out motor insurance before driving and they were informed that all authorised insurers (whose names were annexed) had given the above assurance. A revised and extended circular was sent to diplomatic insurers on 7 November 1972 in the light of additional insurance obligations imposed by the Road Traffic Act 1972. This reminded missions of the assurances from authorised insurers and informed them that on request any authorised insurer would endorse a diplomat's policy as follows:

‘Notwithstanding that the insured is or may be entitled under the Diplomatic Privileges Act 1964 to refuse to submit to the jurisdiction of the Courts in connection with any claim against him, it is hereby declared and agreed that the Insurer will not call upon the Insured to so refuse.’

If a diplomat who had been involved in a road accident where injuries or damage had been inflicted was found to have no third party insurance, we understand that the victim would be entitled to claim from the Motor Insurers' Bureau under the Agreement of 22 November 1972 between the Secretary of State for the Environment and the Motor Insurers' Bureau. We would however take a serious view of any diplomat driving without third party insurance and would probably request his removal from the UK if such conduct came to our knowledge.

A claim of an individual to the Criminal Injuries Compensation Board would not be invalidated or affected in any way by the fact that the perpetrator of the injury had diplomatic immunity. A claimant may also be able to seek redress against a person entitled to immunity from prosecution. There are limitations on the immunity from civil jurisdiction of diplomatic agents and much more extensive limitations on the immunity of administrative and technical staff. All members of diplomatic missions may be sued in the UK after their appointment has ended (Article 39.2) and at any time in the courts of the sending State (Article 31.4). Where legal action is blocked a claimant may ask the Foreign and Commonwealth Office to intervene. Our practice, as explained to Parliament in the 1952 Report on Diplomatic Immunity ([Cmd] 8460) paragraph 3, may extend to pressing for a waiver of immunity or for establishment of a private arbitration.

**Question.** (ii) *What evidence do you have of cases of difficulty arising in this way?*

**Answer.** We are aware of very few cases where claimants have encountered difficulty in obtaining compensation through one of the methods described.

Almost all instances of injuries or damage arise out of motor accidents and are settled by insurers as described above.

#### POLISH CONSULATES-GENERAL

**Question.** (iii) *Why are Consular Officers of the Polish Consulates-General in London and Glasgow, unlike other Consular Officers, entitled to full diplomatic immunity?*

**Answer.** By virtue of bilateral Consular Conventions concluded between 1965 and 1976, full diplomatic immunity is accorded to consular officers and employees of Bulgaria, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Poland, Romania and the Soviet Union in the UK, and to British consular officers and employees in those countries who are not members of their respective diplomatic missions. Parliament is currently being asked to add China to the list. The reciprocal arrangement concerning Poland was provided for in the 1967 Consular Convention between the UK and Poland, as amended by the Protocol of 1976 (Cmnd 7372 of 1978). These arrangements were made for the better protection of the staff of our consulates and, therefore, the interests of British citizens in those countries.

Poland is at present the only one of these countries which has consular posts outside London.

(Parliamentary Papers, 1984-5, HC, Paper 127, pp. 93-4)

#### **Part Five: VIII. B. *Organs of the State—immunity of organs of the State—immunity other than diplomatic and consular***

(See also Part Eight: II. C. (Written Answer of 5 July 1984), below)

In the course of a statement on 9 November 1984 in the Sixth Committee of the General Assembly of the United Nations deliberating upon the report of the International Law Commission, the United Kingdom representative, Sir John Freeland, turned to the topic of jurisdictional immunities of States and their property. He observed:

Turning to the individual draft articles provisionally adopted this year, I can say that draft article 13 is basically acceptable to us. It is necessary for the courts of the forum State to exercise jurisdiction over matters affecting the local labour force and the exceptions contained in paragraph 2 of the draft article make clear that that is the intention. Similarly, we find draft article 14 basically acceptable. The text is close to that of the corresponding provision in the 1972 European Convention on State Immunity; and we believe it essential to ensure that a person who has suffered physical damage to himself or his property and who would normally, but for the fact that a State is involved, have a good cause of action should be able to pursue his remedies in the forum State. On draft article 16, we believe that provisions of the kind contained in this draft article are necessary and, as is pointed out in paragraph (1) of the Commentary, reflect the position of states parties to various international conventions in this area. We have of course noted the concerns expressed in the Commission about possible adverse effects on the developing countries, but it is not clear to us that there are in reality grounds for such concern. To take an example, it surely would not be in the interests of

developing countries if foreign states were able to infringe patents that had been applied for in the former countries and then claim immunity in relation to proceedings brought in those countries.

As for draft articles 17 and 18, I need say only that they do not seem to us to raise difficulties. The Commission's deliberations on draft article 19 were not completed and will be continued at its next session. It of course continues to be our view that state-owned ships employed in commercial service should not enjoy immunity.

To conclude my remarks on this topic, Mr Chairman, we consider that useful progress was made at the 1984 session. It is our hope that, next year, the Commission will complete its work on the range of exceptions to the principle of state immunity and will proceed to the question of immunity from execution.

(Text provided by the Foreign and Commonwealth Office)

**Part Six: I. A. *Treaties—conclusion and entry into force—conclusion, signature***

In reply to a question on the subject of the United Nations Convention on the Law of the Sea, the Minister of State, Foreign and Commonwealth Office, Mr Malcolm Rifkind, stated:

It is not the United Kingdom's normal practice to sign a convention unless we feel able to ratify it in due course.

(HC Debs., vol. 64, col. 972: 25 July 1984)

In reply to a further question, Mr Rifkind stated:

The hon. Gentleman said that there are precedents when we have signed a treaty and not subsequently ratified it. That may have been the case where there have been subsequent developments that have made it inappropriate to ratify a treaty or convention, but I am not aware of any precedent when Her Majesty's Government have signed a treaty or convention in the knowledge that they would be unable to ratify it because of its terms. That would be an unattractive principle in international law . . .

(Ibid., col. 973)

In a later debate on the same subject, Mr Rifkind stated:

My hon. Friend the Member for Bristol, East has argued that we should sign the convention and show a commitment to it in the hope that the preparatory commission will listen to our concerns. As I have mentioned to the House, it is not our practice in the United Kingdom to sign international treaties that we do not think we will be able to ratify. We are not in a position to undertake to ratify the United Nations law of the sea convention. Even those who favour signature would regard ratification of the present convention as against our interests.

My hon. Friend the Member for Bristol, East mentioned various examples which he described as precedents—there is no such thing. The examples he cited are not cases where we signed a convention or a treaty in the declared knowledge that we did not intend to ratify them. In some cases there have been reasons that delayed ratification. The original signature may have been rendered inappro-

priate in the light of the new, changed circumstances. There is no precedent for the United Kingdom to sign a convention that it already knows it cannot ratify. That is an important consideration.

I must emphasise the fact that all the major European Community countries and other countries such as Japan which have signed the convention have made it clear that they will not ratify the convention. It may be acceptable to them to sign treaties that they do not intend ratifying, but that is not a principle that has carried weight in the United Kingdom. I should be surprised if my hon. Friends were suggesting that we should go back on a basic principle of our approach to international treaties, simply because it might have a beneficial political effect on our international relations.

(HC Debs., vol. 69, cols. 644–6: 6 December 1984)

**Part Six: I. B. *Treaties—conclusion and entry into force—reservations and declarations to multilateral treaties***

The Foreign and Commonwealth Office submitted a memorandum, dated 6 June 1984, on the subject of diplomatic immunities and privileges to the Foreign Affairs Committee of the House of Commons which was investigating the subject in the wake of the shooting incident at the Libyan mission in London on 17 April 1984. The memorandum took the form of questions and answers and contained the following extract:

*Question 10*

*On accession to the 1961 Vienna Convention, the Libyan Arab Jamahiriya reserved its right to request the opening of diplomatic bags or, if such request was refused, to return such bags to the sending country. Has HMG on any occasion received or complied with such a request from the Libyan authorities?*

*Answer*

13. No. The Libyan Arab Jamahiriya has not requested the opening of any British diplomatic bags.

*Question 11*

*For what reason did HMG not register a formal objection—or, alternatively, enter a similar reservation—in respect of the Libyan reservation referred to above? Did HMG's failure to object indicate its recognition of the possibility of reciprocal discrimination against the Libyan diplomatic bag under Article 47(2)(a)?*

*Answer*

14. Her Majesty's Government gave careful consideration to the possibility of objecting to a reservation in the terms of the Libyan one when such a reservation was first lodged by Kuwait in 1969. The view was then taken that a reservation in those terms was not incompatible with the object and purpose of the Vienna Convention on Diplomatic Relations. In forming such a view the Government took into consideration that the terms of the reservation reflected customary international law as it was before the Vienna Convention and the fact that at the Vienna Conference which drew up the Convention the UK had re-introduced an amendment to Article 27, which, had it been accepted, would have led to

the wording of that Article corresponding in substance to the earlier law. When similar reservations were made, first by Libya on its accession in 1977 and secondly by Saudi Arabia on its accession in 1981, there were no new factors suggesting that this earlier conclusion was wrong. By way of contrast the UK did object to a reservation made by Bahrain in 1973 under which Bahrain reserved the right 'to open the diplomatic bag if there were serious grounds for presuming that it contains articles the import or export of which is prohibited by law'.

15. All these reservations were made subsequent to ratification by the UK in 1964, which was the last occasion on which a reservation to the Convention could have been validly made by the UK.

16. 'The possibility of reciprocal discrimination against the Libyan diplomatic bag was not a factor in the consideration of whether to object to the Libyan reservation. The United Kingdom indeed recognises that that possibility exists. In practice, as indicated in the response to the previous question, Libya has never sought to rely on its reservation as against UK diplomatic bags.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 3-4)

On 20 June 1984, the Foreign Affairs Committee took evidence on the above subject from, *inter alios*, Sir Antony Acland, Permanent Under-Secretary of State, Foreign and Commonwealth Office, and Head of the Diplomatic Service, Sir John Freeland, Legal Adviser, Foreign and Commonwealth Office, and Mr Eustace Gibbs, Assistant Under-Secretary of State, Foreign and Commonwealth Office, Vice Marshal of the Diplomatic Corps and Head of Protocol Department. The following are extracts from the proceedings:

[Q. 15.] . . . in the memorandum which you very kindly placed before the Committee, you referred to the reservation which the Libyans gave at the time that they acceded to the Convention in respect of diplomatic bags. The reservation which they gave was that they reserved the right to inspect diplomatic bags or, if the inspection was not acceded to, to insist on their return. In your memorandum you say that we took the view that that attitude on the part of the Libyans was not incompatible with the purposes of the Convention. The question I would like to ask is this: do you still consider that that particular reservation is not incompatible with the Convention which has now been in force for 20 years or indeed with customary international law?

(Sir *Antony Acland*.) We do still take the view which was taken I think in 1969, that a reservation which does allow the challenge which you have cited, followed by supervised search or rejection of a suspect diplomatic bag, is not incompatible with the object or purposes of the Vienna Convention. The whole question of the treatment and handling of diplomatic bags is one which is under active consideration. It is perhaps worth observing that the Libyans, although they made that reservation, have never in fact relied on it in order to ask for a search. The one or two other countries which made the same reservation, Kuwait, Saudi Arabia and Bahrain, also have reservations to Article 27 of the Convention and our

practice has been not to make any reciprocal attempts to search or to ask for the opening of bags of those countries who have indicated they might wish to do so themselves. The Libyans have not actually exercised the reservation and our view remains, and I think Sir John could add to this, that that reservation is not incompatible with the Vienna Convention as it stands.

...

[Q. 20.] Sir Antony, I can well understand the wish of the Foreign Office and Ministers not to, as it were, escalate in this area, but you have mentioned that notice was given by the Libyans that they might wish in fact to use the provisions of the Article. Did they in fact do so?

(Sir *Antony Acland*.) No, they did not. They made this reservation on the Vienna Convention but they have not done so.

[Q. 21.] We did not make any such reservation in reciprocation?

(Sir *Antony Acland*.) We did not, no.

(Sir *John Freeland*.) Just in case there is any misunderstanding, it was not of course necessary for us to make some corresponding response (we could not have made a reservation because we had already become a party). The fact of the matter is that the Law of Treaties Convention, which in this respect reflects customary international law, provides that where a state has established a reservation against another party, and that was the case with Libya as against the United Kingdom since we did not object, that reservation qualifies the obligation to which it is addressed for *both* of them. So, without any more ado we would have had the ability to respond.

[Q. 22.] Automatic reciprocation?

(Sir *John Freeland*.) Yes.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 22-4)

[Q. 26.] On the question of the diplomatic bags, Sir John I think was saying that because we said nothing when Libya entered the reservation which reserved for them the right to request the opening of anything which they thought was suspicious and we could have made a reaction, as we did to Bahrain's reservation with which we did not agree, we were therefore in the same position as Libya and able, therefore, to request to search any diplomatic bag over which we were suspicious. Is that a correct understanding of what you were saying?

(Sir *John Freeland*.) Yes, but I would add this: when I said we did not need to make any response in the case of the reservations by Kuwait, Libya and Saudi Arabia, which we regarded as not being incompatible with the object and purpose of the Convention, that is to say which we regarded as reservations which a state could properly put forward, what I meant was that we did not have to respond in any way to be in a position where, as I understood Mr Nigel Spearing, he thought it desirable for us to be—that is, in a position to respond in kind if the Libyans proceeded in accordance with their reservation. That is quite different from the situation over the Bahrain reservation which we did regard as incompatible with the object and purpose of the Convention because it went much further than the other two and provided for opening, not for challenging followed by supervised search or rejection. We did respond and said that we objected to the Bahrain reservation.

[Q. 27.] So the situation then is that because of the Libyan reservation which we had accepted we could ask any carrier of a diplomatic bag to open that bag if we

had reasonable grounds for thinking it contained articles that would be prohibited under the Convention?

(Sir *John Freeland*.) As a matter of law that is so but in fact we had taken the view—and I would add that we took this view in part because we have throughout attached a great importance to securing the widest possible uniformity of practice under the Convention—that wherever we could we would try to take a course which might lead to the withdrawal of reservations and that has happened in some cases. So we did not decide to operate other people's reservations, if I can put it that way, unless they were operated in practice against us, which they were not.

[Q. 28.] But if we thought that a diplomatic bag was containing guns or ammunition or drugs did not the Libyan reservation entitle us to ask to have such a bag searched?

(Sir *John Freeland*.) The Libyan reservation would have entitled us to do what the Libyans said they had reserved the right to do, in relation to a bag of theirs if we had had good reasons for so suspecting.

[Q. 29.] In other words, the fact that a reservation has not been used does not mean to say it is not usable?

(Sir *John Freeland*.) No.

[Q. 30.] It seems that in law we did have the right to search a diplomatic bag of which we were suspicious?

(Sir *John Freeland*.) A Libyan diplomatic bag or a Kuwaiti or Saudi Arabian diplomatic bag, yes.

(*Ibid.*, pp. 24–5)

In reply to the oral question whether the belief of the Secretary of State for the Home Department in the sanctity of diplomatic immunity, expressed at the time of the siege of the Libyan mission, had 'been dented by the Foreign Office admission that it had, after all, the power to search Libyan diplomatic baggage,' the Secretary of State, Mr Leon Brittan, replied:

Not in the slightest. It is true that the Libyan Government entered a reservation with their signature to the convention in 1977 which would allow them, in certain circumstances, to have a bag opened, but they never operated that reservation. Such reservations are intensely undesirable, and that is why it has always been our practice to respect the inviolability of diplomatic bags in order to protect our own diplomatic bags.

(*HC Debs.*, vol. 62, col. 468: 21 June 1984)

On 18 July 1984, the Foreign Affairs Committee took evidence from the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe. The following extract is taken from the proceedings:

(Sir *Geoffrey Howe*.) I think the most important point about the Libyan Government is given in the answer to question number 10 in the original memorandum we submitted which sets out that the Libyan Government has not, in fact, requested the opening of any British diplomatic bag, . . . the background is

set out more fully in the answer to question 14. You recollect it was a reservation for the pre Vienna Convention law. In fact, it has not been exercised in that case. They have not exercised that right.

[Q. 137.] Nevertheless the right is there. . . .

(Sir *Geoffrey Howe*.) The point I wanted to underline is that the exercise of the right to withhold or break the passage of our diplomatic bags undoubtedly would have the effect I have described in my statement. There are some isolated cases where the right has been or should be claimed and has not been exercised and thus far it has had a limited impact. I have no doubt at all if there were to be a general change it would be a serious situation.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 47)

**Part Six: I. C. *Treaties—conclusion and entry into force—entry into force, ratification***

In reply to the question what are the problems preventing the ratification of the 1970 UNESCO Convention on the means of prohibiting and preventing the illicit import and export and transfer of ownership of cultural property, the Minister of State, Privy Council Office, and Minister for the Arts, wrote in part:

The problems faced by the Government in ratifying this convention arise from a number of its provisions:

- (i) the convention's definition of cultural property is extremely wide and open to numerous interpretations by different countries;
- (ii) the certification of exported goods would impose a heavy additional burden of work on both Government and the art trade;
- (iii) the implementation of the provisions concerning the acquisition, restitution and prohibition of imports would almost certainly require new legislation and the allocation of substantial additional administrative resources. The identification and verification of claims made against items imported into the United Kingdom would be difficult and create an additional burden on HM Customs and Excise and the police. The Government would not wish to interfere unjustifiably with private rights of ownership;
- (iv) the requirement for all dealers to keep registers of origin of the material bought and sold would cause serious difficulties of implementation and enforcement.

(HL Debs., vol. 452, cols. 132-3: 21 May 1984)

In the course of a statement in explanation of vote in the Sixth Committee of the General Assembly of the United Nations on 7 December 1984, the United Kingdom representative, Mr F. D. Berman, referred to the Convention on the Representation of States in their Relations with International Organizations, 1975. He continued:

The fifth preambular and first operative paragraphs of the draft resolution refer to a convention, the history of which shows that it has failed so far to meet with

general acceptance. It was adopted after a divided vote. Only twenty-three States have signed it including very few of the present co-sponsors. Ten years after adoption the Convention has not yet entered into force and it remains far short of the requisite number of ratifications or accessions. Indeed, only a handful of co-sponsors are themselves parties to it.

It is self-evident therefore that many States have considerable misgivings about the convention. It is accordingly inappropriate in the view of my delegation that the General Assembly should, via operative paragraph 1 of this resolution, put pressure on States to ratify or accede to this Convention. It is for a State to decide in exercise of its sovereign rights to choose whether or not to become a party to a particular convention. Moreover, my delegation takes particular exception to the singling out of States which are host states. They are just as entitled as other states to decide for themselves whether to ratify or to accede to this convention.

(Text provided by the Foreign and Commonwealth Office)

**Part Six: II. A. *Treaties—observance, application and interpretation—observance***

In reply to a question on the subject of the United Kingdom's obligations under the Treaty of Lausanne as it affects the Aegean, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The treaty of peace with Turkey signed at Lausanne in 1923 is wide-ranging and covers many issues of relevance to the Aegean. We have no reason to believe that we are not adequately discharging any obligation which the treaty may still impose upon us.

(HC Debs., vol. 69, Written Answers, col. 450: 11 December 1984)

In reply to a further question, the same Minister wrote:

We have no reason to believe that we are not adequately discharging any obligation imposed upon us by the treaty of Lausanne. The convention respecting the Thracian frontier was superseded by an agreement signed at Salonika on 31 July 1938, to which we are not a party.

(Ibid., col. 628: 14 December 1984; see also *ibid.*, vol. 70, Written Answers, col. 136: 18 December 1984)

**Part Six: II. D. *Treaties—observance, application and interpretation—treaties and third States***

(See Part Eight: II. C. (material on Berlin), and Part Eight: IV. (item of 29 November 1984), below)

**Part Six: III. *Treaties—amendment and modification***

The Foreign and Commonwealth Office, in its memorandum dated

6 June 1984 previously mentioned (see Part Six: I. B., above), gave the following reply to a question about the Vienna Convention on Diplomatic Relations, 1961:

*Question 31*

*Please summarise the formal procedure for seeking amendment of the Convention?*

*Answer*

59. The Vienna Convention contains no provision for its amendment and there is accordingly no single formal procedure for seeking amendment. In considering what procedure would be appropriate for seeking amendment, if it were concluded that this course was in the overall interest of the UK, HMG would think it right to have regard to the terms of Article 40 of the Vienna Convention on the Law of Treaties, which provides as follows:

‘1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

- (a) the decision as to the action to be taken in regard to such proposal;
- (b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; Article 30 paragraph 4(b) applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

- (a) be considered as a party to the treaty as amended; and
- (b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement’.

(Although the Law of Treaties Convention does not apply to treaties which, like the Vienna Convention on Diplomatic Relations, were concluded before its entry into force, this Article is among those which HMG regard as reflecting relevant rules of customary international law.)

60. Among the possible ways in which an amendment might be sought would be to request the inclusion of an item on the agenda of this year’s regular session of the General Assembly. (This would be unnecessary if the amendment were concerned only with the diplomatic bag or courier, because such an amendment could be pursued in the context of the item on the Report of the International Law Commission.) We could then propose that the question should be further studied by the ILC (which originally prepared the draft articles on which the Vienna Convention was based), making clear the nature of the amendments we ourselves thought desirable. Alternatively, our proposal could be that UK draft amendments should be discussed in the Sixth (Legal) Committee

of the General Assembly, with a view to the eventual adoption by the General Assembly of an amending Protocol. Another possibility would be to propose the urgent convocation by the Secretary-General of a UN conference to consider a draft amending Protocol which we ourselves might circulate. A further possibility, which unlike the foregoing would not involve recourse to the General Assembly, would be for us to issue invitations to a conference in London to consider UK draft amendments; but that would be a highly unusual way of seeking to amend a UN Convention and might well lead to a reluctance on the part of some states to participate.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 12)

**Part Six: IV. B. *Treaties—invalidity, termination and suspension of operation—invalidity***

(See also Part Eight: II. A. (item of 19 June 1984), below)

In the course of replying to a question about the binding effect on Her Majesty's Government of the Treaty of Utrecht, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

The Anglo/Spanish treaty of peace and friendship of 1713 . . . dealt with a wide variety of issues. Elements of it have fallen into desuetude or have been overtaken by subsequent treaties.

(HC Debs., vol. 63, Written Answers, cols. 297-8: 5 July 1984)

**Part Six: IV. E. *Treaties—invalidity, termination or suspension of operation—consequences of invalidity, termination or suspension of operation***

In reply to the question whether in the context of the shooting incident at the Libyan mission in London the Secretary of State for the Home Department will assure the House that where diplomatic immunity is breached in such an incident it automatically follows that the British Government are discharged from any previous obligations, the Secretary of State, Mr Leon Brittan, stated:

I am not quite sure what the right hon. Gentleman means by a release from obligations. We are not discharged from the obligations of the treaty, but I can assure him as has been said, that if there is a proved abuse or breach of the convention, the Government are in no sense powerless to act and have explained our willingness within the confines of the convention to take vigorous action on any missions that have been proved to be guilty of abuses.

(*Ibid.*, vol. 63, col. 613: 6 July 1984)

The Foreign and Commonwealth Office submitted a memorandum, dated 6 June 1984, on the subject of diplomatic immunities and privileges to the Foreign Affairs Committee of the House of Commons which was investigating this subject in the wake of the above incident. The memorandum took the form of questions and answers.

*Question 23*

*Does HMG believe that the Convention provides sufficient scope for the receiving country to vary the operation of particular provisions in cases where serious abuses of the Convention are known to have occurred?*

*Answer*

43. Yes. It should be stressed that there has been no previous occasion on which the UK has suffered from an abuse of the Convention of remotely comparable gravity. The Convention itself provides remedies against individuals who abuse their status by failing to respect our laws and regulations; and in cases where individuals who cannot be prosecuted are not immediately withdrawn by the sending State (as usually happens), we either exercise our powers to declare them *persona non grata* or, in the case of criminal offences which are serious but not on a par with murder or espionage, request an early transfer of the individual concerned. Where the missions collectively or the sending State can be regarded as responsible, the ultimate sanction under the Convention is breach of diplomatic relations, but this sanction has never previously been seriously contemplated in this context by the UK. A much more common breach of the Convention (although not properly speaking an *abuse* of the Convention) consists in failure by a receiving State to accord appropriate protection to an Embassy against mob attack—often officially inspired. There have been numerous instances of this in recent years, but the States affected have usually responded by no more than a down-grading of level of their diplomatic representation.

44. The Convention must of course be read within the framework of other rules of international law, including those which allow for the possibility of counter-measures in response to a material breach of a treaty by another party. In the context of a treaty such as the Vienna Convention, however, where a primary purpose is to protect diplomats from the consequence of a charge of breach of local laws and where considerations of reciprocity play in practice so central a role, the possibility of retaliatory action, however unlawful, by the other party would clearly have to be taken into account before any decision was taken to resort to counter-measures; and any such recourse would have to be undertaken with the greatest restraint and with full awareness of the wider implications.

45. It should also be recalled that the rules of the Convention do not prejudice the fundamental right of self-defence either in international law or in domestic law. Self-defence was relied on by the Government in conducting a search of all those emerging from the Libyan People's Bureau, who were personally searched for weapons and explosives before it was established whether or not they were diplomats. This was considered essential for the protection of police officers handling this stage of the expulsion.

46. Lastly, any consideration of the sufficiency of the scope which the Convention, taken together with other rules of international law, affords to the receiving state to vary the operation of particular provisions must necessarily take account of the risks to the diplomatic missions of the UK and friendly countries that any enlargement of that scope would involve. It would be unrealistic to discount the possibility that great scope for unilateral variation by the receiving state of the operation of provisions for the inviolability of diplomatic premises and

the immunities of diplomats could be exploited in a way which would be seriously damaging to UK and wider Western interests.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 8-9)

**Part Eight: I. A. *State territory and territorial jurisdiction—parts of territory, delimitation—frontiers***

(See also Part Six: II. A., above, and Part Nine: III., below)

In reply to a question on the subject of disputed boundaries in Africa at the time of a resolution of the Organization of African Unity in 1964, the Minister of State, Foreign and Commonwealth Office, wrote:

We are of course aware of a number of differences of opinion before 1964 between colonial powers and other states about the precise boundaries of some of their dependencies. However, as other governments were and still are involved, we have no standing to produce an authoritative list.

As to the OAU Resolution, I assume that the noble Lord meant to refer to Resolution AHG/Res 16(I) of 1964, which states, 'all Member States pledge themselves to respect the borders existing on their achievement of national independence'. The interpretation of OAU resolutions is a matter for that organisation.

(HL Debs., vol. 447, col. 648: 31 January 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

The British Government support the territorial integrity of Ethiopia within its existing frontiers.

(HC Debs., vol. 56, Written Answers, col. 460: 21 March 1984)

**Part Eight: II. A. *State territory and territorial jurisdiction—territorial jurisdiction—territorial sovereignty***

(See also Part Eight: IV. (Written Answers of 5 March 1984 and 13 December 1984), below)

During a debate in the 48th meeting of the First Committee of the General Assembly of the United Nations, held on 2 December 1983, on the subject of the implementation of the declaration of the Indian Ocean as a zone of peace, the United Kingdom representative, Mr Slinn, stated:

My delegation had not intended to speak this morning, but we have now heard two delegations refer to the 'wrenching' or 'tearing away' of Diego Garcia from Mauritius. I therefore beg the indulgence of the Committee while I set the record straight.

The United Kingdom is in no doubt about its sovereignty over the Chagos Archipelago of which Diego Garcia is the principal island. The Archipelago was ceded, along with Mauritius, the Seychelles and other islands, to Great Britain from France under the Treaty of Paris in 1814. The Chagos Archipelago

remained a Dependency of Mauritius until 1965, but it was loosely administered. The Archipelago, including Diego Garcia, was detached from Mauritius in 1965 with the full agreement of the Mauritian Council of Ministers to form part of the British Indian Ocean Territory.

(A/C. 1/38/PV. 48, p. 37)

In reply to the question

Whether, as a signatory of the 1920 Paris Treaty governing the sovereignty, demilitarisation, etc., of the Spitzbergen archipelago, [Her Majesty's Government is] satisfied that the Norwegian Government is exercising to the full its sovereign rights and duties in Svalbard, in the light of Soviet claims to be providing schools, social services, entertainment, helicopter ports, which appear to go beyond the rights of signatories to the treaty to engage in the exploitation of the economic resources of the islands,

the Minister of State, Foreign and Commonwealth Office, wrote:

Yes. It is known to all the parties to the Treaty of Paris that the Norwegian Government exercises sovereignty in full accordance with the provisions of the treaty and is concerned to ensure that its sovereignty is respected by all the other parties, including the Soviet Union.

(HL Debs., vol. 449, col. 1460: 22 March 1984)

In reply to the question what is the basis of the United Kingdom's claim to sovereignty over the Falkland Islands and from what date does the documentary evidence thereof begin, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The United Kingdom title to the Falkland Islands is derived from early settlement, reinforced by formal claims in the name of the Crown and completed by continuous and effective occupation for over 150 years. The exercise of sovereignty by the United Kingdom over the islands has, furthermore, consistently been shown to accord with the freely expressed wishes, through their elected representatives, of the people who form their permanent population.

The earliest documentary evidence relevant to our title to the Falkland Islands dates from the 1760s.

(HC Debs., vol. 56, Written Answers, col. 598: 23 March 1984)

In a memorandum dated 27 March 1984 submitted to the Foreign Affairs Committee of the House of Commons, the Foreign and Commonwealth Office referred to the negotiations between Britain and Argentina in April–June 1982 and continued:

The Government's approach in all the negotiations was based on important principles, which Ministers had set out repeatedly in Parliament:—

(c) *Sovereignty*. Britain has no doubt of her sovereignty over the Falkland Islands, having administered them peacefully since 1833. . . .

(*Parliamentary Papers*, 1983–4, HC, Paper 268–viii, p. 122)

In the course of a debate on the subject of the South Atlantic, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, Mr Ray Whitney, stated:

As to the British claim to the sovereignty of the Falklands, there is no doubt about that. These are complex issues stretching over many centuries, and I am aware that if the hon. Gentleman wishes he can find the odd official who has put a different interpretation on a particular aspect. However, no British government of any political complexion have ever been in any doubt about our claim to sovereignty, and that remains the same. We stand by our commitment to the Falkland islanders.

(HC Debs., vol. 61, col. 620: 8 June 1984; see also HL Debs., vol. 454, cols. 1754-6: 20 July 1984)

On 20 June 1984, the Foreign Affairs Committee of the House of Commons took evidence from Baroness Young, Minister of State, Foreign and Commonwealth Office, on the subject of the Falkland Islands. In the context of the exclusion by the British Government of the topic of sovereignty in discussions with the Argentine Government, the Minister was asked what Her Majesty's Government meant by 'sovereignty' and what matters would therefore be excluded from negotiations. She replied:

I think it is generally regarded in international law that sovereignty involves the exclusive right to exercise state authority within a territory. When we are talking about the Falkland Islands, they are British, and successive British governments have made it clear that they have no doubts about our sovereignty over the Falkland Islands. We therefore said that we were not prepared to discuss sovereignty over the Falkland Islands with Argentina and we have consistently said that the proposals we have made are designed to build confidence on a step-by-step basis, in various areas, where we do believe we could reach agreement which would be of benefit to Argentina as well as to ourselves.

(*Parliamentary Papers*, 1983-4, HC, Paper 268-viii, p. 133)

Asked then whether a discussion on joint sovereignty would be excluded, Baroness Young replied:

I think that I would not wish to be drawn into a long discussion on so complex a topic as sovereignty. What we are saying now is that the sovereignty of the Falkland Islands is British; that we are not prepared to negotiate in the terms which I think have been understood, for example, at the United Nations, by which they mean that the Falkland Islands would become part of Argentina. I would not wish to be drawn any further than to say that the present position of the Government is that we are not prepared to negotiate on sovereignty.

(*Ibid.*)

The following declaration dated 19 June 1984 was made by the delegation of the People's Republic of China to the 19th Congress of the Universal Postal Union:

The Chinese delegation has noted, on reading the list of participants distributed by the 19th UPU Congress, that the delegation of Great Britain has included the representatives of Hong Kong Post Office in the list of its delegates. In this connection, the postal delegation of China wishes to publish the following declaration:

‘It is a matter of common knowledge that Hong Kong, the problem of which is a relic of the historical past, is a Chinese territory which has been occupied by imperialism through unfair treaties imposed on China. Sovereignty over Hong Kong belongs to China, and the restoration of the exercise of China’s sovereignty over Hong Kong is an unshakeable principle of the Chinese Government. The above-mentioned action on the part of the delegation of Great Britain can have no effect on China’s position, which is to restore the exercise of its sovereignty over Hong Kong’.

(Congress document 60)

In reply, the delegation of the United Kingdom made the following statement dated 25 June 1984:

With reference to the declaration by the People’s Republic of China dated 19 June 1984 and circulated at the request of the Head of the postal delegation of that country, the delegation of the United Kingdom of Great Britain and Northern Ireland wishes to state that Her Majesty’s Government’s views on this question were clearly set out in the letter of 14 December 1972 addressed to the Secretary-General of the United Nations by Her Majesty’s Representative in New York.

(Ibid. 71)

[*Editorial note:* The letter of 14 December 1972 read in part as follows:

My Government has asked me to inform Your Excellency that, in view of paragraph 73 of Chapter 1 of the report of the Special Committee (A/8723 (part I)), they have decided that no useful practical purpose would be served by continuing to transmit information on Hong Kong under Article 73 e of the United Nations Charter. My Government have also asked me to state that the action of the General Assembly in no way affects the legal status of Hong Kong. The views of my Government about this status are well known. They are unable to accept any differing views which have been expressed or may hereafter be expressed by other Governments. (A/8989).

In paragraph 73 mentioned above, the Special Committee recommended to the General Assembly that Hong Kong and Macau and dependencies be excluded from the list of territories to which the Declaration on the Granting of Independence to Colonial Countries and Peoples was applicable.]

In the course of replying to a question about the binding effect on Her Majesty’s Government of the Treaty of Utrecht of 1713, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

As regards the provision of article X of the treaty, which concerns Gibraltar, Britain’s entitlement to sovereignty has been consistently maintained.

(HC Debs., vol. 63, Written Answers, col. 298: 5 July 1984)

On signature of the Acts of the 19th Congress of the Universal Postal Union on 18 July 1984, the United Kingdom made the following declaration:

The Government of the United Kingdom of Great Britain and Northern Ireland has no doubt as to United Kingdom sovereignty over the Falkland Islands, the Falkland Island Dependencies and the British Antarctic Territory. In this context attention is drawn to article IV of the Antarctic Treaty to which both the United Kingdom and Argentina are parties, which freezes territorial claims in Antarctica.

The United Kingdom Government therefore does not accept the declaration of the Argentine Republic claiming to contest United Kingdom sovereignty over the above-mentioned territories, nor does it accept the declaration of the Argentine Republic concerning article 28, paragraph 1, of the Universal Postal Convention. (Congress document 100/Add 1)

On 27 July 1984, the United Kingdom made a further declaration in the following terms:

With regard to the interpretation of article 3, b, of the Constitution of the Universal Postal Union, adopted by the Congress on the proposal of the Executive Council, the United Kingdom wishes to state that the British Antarctic Territory (like all its dependent territories) falls within article 3, a, of the Constitution and is therefore unaffected by that interpretation: and with regard to certain statements made in connection with that interpretation, the United Kingdom wishes to state that it has no doubt as to its sovereignty over the British Antarctic Territory and in that context wishes to draw attention to article 4 of the Antarctic Treaty 1959.

(Text provided by the Department of Industry)

In the course of a debate in the House of Lords on the subject of talks with Argentina over the Falkland Islands, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... we are confident of our position on sovereignty, and we do not consider it necessary to refer this matter to the International Court of Justice.

(HL Debs., vol. 454, col. 1756: 20 July 1984)

In reply to the question what is the definition of 'sovereignty' in the context of the Falkland Islands, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

In relation to any territory, including the Falkland Islands, sovereignty involves the rights and duties of government and defence and, generally, of the exercise of State authority.

(HC Debs., vol. 64, Written Answers, col. 507: 23 July 1984)

During a debate on 31 October 1984 in the Security Council on the subject of the Falkland Islands, the Permanent Representative of the United Kingdom to the United Nations, Sir John Thomson, referred to

earlier comments in the debate by the Foreign Minister of Argentina. He observed:

Yet another misleading thought was propagated in the Foreign Minister's speech. He said that

'the conflict over the Malvinas Islands began with a British act of force whereby the Argentine population living in the islands was evicted.' (*A/39/PV. 44, p. 23*)

The truth is that there was no settled Argentine population in the Falkland Islands in 1833. Indeed, the islands were practically deserted, apart from a few settlers of various nationalities, when British occupation was effected peacefully, without a shot being fired. Except for the Argentine invasion, Britain has remained in open, continuous, effective and peaceful possession, occupation and administration of the Falkland Islands.

(*A/39/PV.45, pp. 53-5*)

In reply to a question on the subject of Spain's future accession to the European Communities, the Minister of State, Foreign and Commonwealth Office, wrote:

None of the participants in the accession negotiations, including the Commission, has suggested that Ceuta and Melilla should not be discussed in the negotiations as part of the kingdom of Spain. Under Spanish law they are part of the kingdom of Spain. It is common ground that the terms of the Spanish accession treaty will apply to all parts of the kingdom of Spain.

(*HC Debs., vol. 69, Written Answers, col. 25: 3 December 1984*)

**Part Eight: II. C. *State territory and territorial jurisdiction—territorial jurisdiction—concurrent territorial jurisdiction***

In the course of a debate on the subject of the detention in Spandau prison of Rudolf Hess, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... my understanding of the position is that unilateral action by the British Government, or by the three Western powers acting in concert, would constitute a violation of a binding international agreement. That would be a grave step in any circumstances. In Berlin, where the Western position largely depends on a complex of four-power agreements a deliberate breach of one agreement would put at risk other more fundamental agreements on which the security of West Berlin is based. We must not, after all, forget our responsibility to the two million inhabitants of West Berlin.

(*HL Debs., vol. 450, cols. 230-1: 28 March 1984*)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Russians have recently notified the three Allied powers in the Berlin air safety centre of Soviet air exercise activities in the areas of the three Berlin air corridors. Similar Soviet exercises have taken place in the past. In order to ensure adequate air traffic separation, Allied aircraft have been requested on such

occasions to fly at higher altitudes along the air corridors to and from Berlin. The allies have expressed their dissatisfaction to the Soviet authorities at such requests.

Flight schedules have not been affected. The movement of aircraft to and from Berlin along the air corridors remains the responsibility of the three Western Allies and the Soviet Union in accordance with long-standing quadripartite agreements and practices.

(HC Debs., vol. 58, Written Answers, col. 272: 11 April 1984)

The following certificate, dated 17 September 1984, was issued by the Foreign and Commonwealth Office in connection with litigation seeking to join the British Military Commandant in Berlin as a defendant in a civil action in the English courts:

I, Sir Richard Edward Geoffrey Howe, Knight, Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, hereby certify pursuant to Section 21 of the State Immunity Act 1978, that Germany is a State for the purposes of Part I of the State Immunity Act 1978, and that the persons to be regarded for the purposes of Part I of the said Act as the government of Germany include the members of the Allied Kommandatura of Berlin, including the British Military Commandant, currently Major General Bernard Charles Gordon Lennox.

(Text provided by the Foreign and Commonwealth Office)

The following letter, dated 10 January 1984, was sent by the Soviet delegation to the chairman of the Economic Commission for Europe Working Party on air pollution problems:

The delegation of the Federal Republic of Germany to the Working Party on Air Pollution at its thirteenth session includes Mr. Oels, an employee of the Federal Environmental Agency of the Federal Republic of Germany, illegally established in Berlin (West).

The inclusion of an employee of that Agency in the delegation of the Federal Republic of Germany can only be seen as an act aimed at abusing the authority of the Economic Commission for Europe in order to legalize the illegal establishment in Berlin (West) of Government institutions of the Federal Republic of Germany.

The presence of such institutions in Berlin (West) is a direct contravention of the provision of the Quadripartite Agreement of 3 September 1971 to the effect that Berlin (West) is not a constituent part of the Federal Republic of Germany and continues not to be governed by it. Attempts to involve such institutions in international co-operation create difficulties and prevent ECE from accomplishing its tasks.

In reply, the delegation of the United Kingdom wrote on the same day:

On behalf of the Governments of France, the United States of America and the United Kingdom of Great Britain and Northern Ireland, I should like to address you on the subject raised by the head of the delegation of the Union of Soviet Socialist Republics in his letter of 10 January 1984.

The establishment of the Federal Environmental Agency in the Western Sectors of Berlin was approved by the French, American and British authorities acting on the basis of their supreme authority. These authorities are satisfied that the Federal Environmental Agency does not perform in the Western Sectors of Berlin acts in exercise of direct state authority over the Western Sectors of Berlin. Neither the location nor the activities of that Agency, in the Western Sectors of Berlin, therefore, contravenes any of the provisions of the Quadripartite Agreement.

We cannot agree that the involvement of institutions such as the Federal Environmental Agency in any way impedes the work of international conferences.

Furthermore, there is nothing in the Quadripartite Agreement which supports the contention that residents in the Western Sectors of Berlin may not be included in delegations of the Federal Republic of Germany to international conferences; in fact Annex IV of the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the Western Sectors of Berlin in international conferences and that Western Sectors of Berlin residents may participate jointly with participants from the Federal Republic of Germany in international exchanges. Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegations.

(ENV/WP. 1/20, Annex IV)

In a communication received by the Secretary-General of the United Nations on 5 December 1983, the Government of the Union of Soviet Socialist Republics made the following objection regarding the declaration made by the Federal Republic of Germany, upon ratification, with respect to the application to West Berlin of the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques:

The declaration by the Government of the Federal Republic of Germany that the application of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques extends to Berlin (West) is illegal. The aforesaid Convention, in all of its substance, directly affects matters of security and status and consequently is among those international agreements and arrangements whose application the Federal Republic of Germany, in accordance with the Quadripartite Agreement of 3 September 1971, has no right to extend to Berlin (West).

In a communication dated 23 January 1984, the German Democratic Republic also stated:

The statement by the Government of the Federal Republic of Germany to the effect that the Convention on the Prohibition of Military or Any Other Hostile Uses of Environmental Modification Techniques of 18 May 1977 is to be extended to Berlin (West) runs counter to the Quadripartite Agreement of 3 September 1971, which stipulates that the Federal Republic of Germany may not extend to Berlin (West) agreements concerning matters of the latter's security and status. However, the above-mentioned convention is in its entirety concerned with such matters. Consequently, the statement of the Federal Republic of

Germany that the application of the Convention to Berlin (West) is subject to the rights and responsibilities of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America does not in any way alter the fact that the statement applying the Convention to Berlin (West) is illegal. The statement of the Government of the Federal Republic of Germany cannot, therefore, have any legal effect.

In reply, the Permanent Representatives to the United Nations of the United Kingdom, France and the United States of America wrote to the Secretary-General on 24 July 1984 as follows:

In a communication to the Government of the Union of Soviet Socialist Republics, which is an integral part (Annex IVA) of the Quadripartite Agreement of 3 September 1971, the Governments of France, the United Kingdom and the United States, without prejudice to the maintenance of their rights and responsibilities relating to the representation abroad of the interests of the western sectors of Berlin, confirmed that, provided that matters of security and status are not affected and provided that the extension is specified in each case, international agreements and arrangements entered into by the Federal Republic of Germany may be extended to the western sectors of Berlin in accordance with established procedures. For its part, the Government of the Union of Soviet Socialist Republics, in a communication to the Governments of the three powers which is similarly an integral part (Annex IVB) of the Quadripartite Agreement, affirmed that it would raise no objections to such extension.

The established procedures referred to above, which were endorsed in the Quadripartite Agreement, are designed *inter alia* to afford the authorities of the three powers the opportunity to ensure that international agreements and arrangements entered into by the Federal Republic of Germany which are to be extended to the western sectors of Berlin are extended in such a way that matters of security and status are not affected. When authorizing the extension of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques to the Western Sectors of Berlin, the authorities of the three powers took such steps as were necessary to ensure that matters of security and status were not affected. Accordingly, the Berlin declaration made by the Federal Republic of Germany in accordance with established procedures is valid and the Convention applies to the western sectors of Berlin, subject to Allied Rights and Responsibilities, including those in the Area of Disarmament and Demilitarization.

The three Governments wish further to recall that Quadripartite Legislation on Demilitarization applies to the whole of Greater Berlin.

With reference to the communication received on 23 January 1984 from the Government of the German Democratic Republic (C.N.16.1984. TREATIES-1), the three Governments wish to point out that States which are not parties to the Quadripartite Agreement of 3 September 1971 are not competent to comment authoritatively on its provisions. They do not consider it necessary, and do not intend, to respond to further communications on this matter from States which are not parties to the Quadripartite Agreement. This should not be taken to imply any change in the position of the three Governments in this matter.

(Text provided by the Foreign and Commonwealth Office)

The following letter, dated 23 February 1984, was sent to the Chairman of the Eighth Meeting of Government Officials responsible for standardization policies in the Economic Commission for Europe by the Soviet delegation:

The Soviet delegation would like to draw attention to the fact that the delegation of the Federal Republic of Germany to the Meeting of Government Officials contains a representative of the German Institute for Standardization (DIN), the headquarters of which is illegally located in West Berlin.

The presence of that organization of the Federal Republic of Germany in West Berlin is in direct contradiction with the provision of the Quadripartite Agreement of 3 September 1971 to the effect that West Berlin does not form part of the Federal Republic of Germany and continues not to be governed by it. The Quadripartite Agreement is a contractual instrument of contemporary international law; it must be respected and the Economic Commission for Europe cannot be an exception in that respect.

For these reasons, the Soviet delegation hereby declares that it cannot regard as legitimate the appointment of a representative of the German Institute for Standardization as a member of the delegation of the Federal Republic of Germany, and requests you, Sir, to take appropriate steps to ensure that this declaration is duly reflected in the report of our Meeting.

The delegation of the German Democratic Republic sent the following letter, dated 24 February 1984, to the Chairman:

The delegation of the GDR fully supports the statement made by the delegation of the USSR on this question and states on its part:

The establishment of federal institutions of the FRG in Berlin (West), in particular of the DIN, pointed to repeatedly by the Government of the GDR, is contradictory to the provisions of the Quadripartite Agreement of 3 September 1971 that Berlin (West) is no constituent part of the FRG and continues not to be governed by it. Therefore, the delegation of the GDR can only regard the nomination of a representative of the DIN as a member of the delegation of the FRG as an attempt to misuse the authority of the Economic Commission for Europe for obtaining legal sanctions for FRG State bodies illegally located in Berlin (West) and for purposes which have nothing to do with the fulfilment of the tasks the ECE is facing.

The following reply, dated 14 March 1984, was sent to the Chairman by the French delegation on behalf of the delegations of France, the United States and the United Kingdom:

Le DIN . . . est un organisme non-gouvernemental. Son établissement et ses activités dans les secteurs occidentaux de Berlin ne sont contraires à aucune des dispositions de l'Accord quadripartite du 3 septembre 1971. Il revient en outre à la République Fédérale d'Allemagne seule de composer la liste de sa délégation.

En ce qui concerne la lettre de la délégation de la République Démocratique allemande, je souhaite marquer que les États qui ne sont pas partie à l'Accord quadripartite n'ont pas compétence pour en interpréter les dispositions de manière autorisée.

Nous ne pouvons donc admettre que le participation d'institutions comme l'Institut allemand pour la Standardisation fasse obstacle de quelque manière que ce soit aux travaux de la Commission Economique pour l'Europe.

(Text provided by the Foreign and Commonwealth Office.)

In depositing its Instrument of Accession to the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, the Soviet Union stated on 3 November 1983:

In acceding to the said Protocol, the USSR also considers it necessary to reaffirm the position set forth in the note of the Embassy of the USSR . . . in Great Britain . . . of 20 December 1982 in connection with the statements made by the Government of the Federal Republic of Germany about the extension of the Convention and the Protocol thereto to West Berlin. The USSR proceeds as before on the basis that these statements are unlawful and void of legal force.

In reply, the Government of the United Kingdom, in a communication dated 2 April 1984, stated:

In connection with this statement, the Secretary of State for Foreign and Commonwealth Affairs would like, on behalf of the Governments of the United Kingdom of Great Britain and Northern Ireland, of France and of the United States of America, to reaffirm the position set forth in his Note of 19 May 1983 [UKMIL 1983, pp. 474-5].

When authorizing the extension of the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, to the Western Sectors of Berlin, the authorities of the Three Powers took such steps as were necessary to ensure that matters of security and status were not affected. Accordingly, the Berlin declaration made by the Federal Republic of Germany in accordance with established procedures is valid and the Convention applies to the Western Sectors of Berlin with full force and effect.

(IMO document PMP/Circ. 37)

In reply to letters sent to the Secretary-General of the United Nations, as depositary, by the Governments of the Soviet Union and the German Democratic Republic in which they commented upon a declaration made by the Federal Republic of Germany in ratifying the Convention on Long-Range Transboundary Air Pollution, 1979, with respect to its application to West Berlin, the Governments of the United Kingdom, France and the United States of America made the following statement dated 27 April 1984:

The Governments of France, the United Kingdom and the United States wish to point out that the Soviet declaration referred to above contains an incomplete and therefore misleading reference to the Quadripartite Agreement of 3 September 1971. The provision of the Quadripartite Agreement to which reference is made states that 'the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed taking into account that these Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it'.

With regard to the declaration of the German Democratic Republic contained in [depository notification] C.N.253.1983. TREATIES—4 of 25 August 1983, the three Governments reaffirm that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions. (CN 97. 1984. TREATIES—1)

The Soviet delegation to the 37th World Health Assembly addressed the following letter, dated 14 May 1984, to its President:

The delegation of the USSR at the Thirty-seventh World Health Assembly, referring to the list of participants in the Assembly (document WHA37/DIV/3 Rev.1 of 10 May 1984), deems it necessary to state in connection with the inclusion of Dr Ruth Mattheis, Director of the Public Health Department of West Berlin, in the delegation of the Federal Republic of Germany, that this inclusion may be recognized only with due regard for the political status of West Berlin and for the fact that the participation of permanent residents of West Berlin in international meetings jointly with representatives of the Federal Republic of Germany is possible only on the basis of the provisions of the four-power agreement of 3 September 1971, according to which West Berlin is not a component part of the Federal Republic of Germany and cannot be administered by it. (A37/INF.Doc./10)

The delegation of the German Democratic Republic addressed a letter, also dated 14 May 1984, to the President as follows:

Referring to the list of participants of the Thirty-seventh World Health Assembly (document WHA37/DIV/3/Rev.1 of 10 May 1984) and in connection with the indication of Mrs Dr Ruth Mattheis, Director, Public Health Department, Berlin (West), in the delegation list of the Federal Republic of Germany, I feel obliged to reaffirm the standpoint that under the Quadripartite Agreement of 3 September 1971, Berlin (West) is not a constituent part of the Federal Republic of Germany and is not to be governed by it. Accordingly, the Quadripartite Agreement stipulates that subject to this and under the conditions established in Paragraph 2(d) of Annex IV to the Agreement, permanent residents of Berlin (West) may participate jointly with participants from the Federal Republic of Germany in international exchanges, but not in the capacity of participants from the Federal Republic of Germany. (A37/INF.Doc./9)

In reply, the chief delegate of the United States of America addressed to the President a letter dated 15 May 1984 as follows:

On behalf of the delegations of France, the United Kingdom of Great Britain and Northern Ireland and the United States of America I wish to state that the statement by the Soviet delegate contains an incomplete and consequently misleading reference to the Quadripartite Agreement of 3 September 1971. The relevant passage of that Agreement to which the Soviet representative referred provides that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that the Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

Furthermore, there is nothing in the Quadripartite Agreement which supports the contention that residents of the Western Sectors of Berlin may not be included in the delegation of the Federal Republic of Germany to international conferences.

In fact, Annex 4 of the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the Western Sectors of Berlin in international conferences and that permanent residents of the Western Sectors of Berlin may participate jointly with participants from the Federal Republic of Germany in international exchanges. Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegations.

Regarding other communications on this subject, we would like to take this opportunity to bring to your attention that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

(A37/INF.Doc./11)

On 9 February 1984, the Soviet delegation to the Eighth Special Session of the United Nations Commission on Narcotics Drugs addressed a letter to its Chairman in which it was stated:

As the Soviet delegation has already repeatedly pointed out, in particular in the course of previous sessions of the Commission, the continuing practice of mentioning, in the Commission's documents, the Federal Health Agency of the Federal Republic of Germany, illegally situated in West Berlin, cannot be accepted as lawful. As is well known, the establishment of any institution of the Federal Republic of Germany on the territory of West Berlin, including the above-named institution, is directly contrary to the quadripartite agreement of 3 September 1971.

The delegation of the USSR considers it necessary once more to affirm that its position on this matter is immutable, and insists on the discontinuance of attempts to use the United Nations Commission on Narcotic Drugs for the legalization of Federal Agencies of the Federal Republic of Germany unlawfully situated in West Berlin.

(E/CN.7/1984/INF.2/Rev. 1)

Following a letter of the same date on similar lines from the delegation of the German Democratic Republic, the Permanent Representative of the United States Mission to the United Nations System Organizations in Vienna replied on 30 May 1984 as follows:

With respect to the letter of 9 February 1984 from the Representative of the Union of Soviet Socialist Republics to you concerning the reference to the Federal Health Office in Document E/CN.7/1984/INF.2/Rev. 1, I wish to state the following on behalf of the Delegations of France, the United Kingdom and the United States of America.

The establishment of the Federal Health Office in the Western Sectors of Berlin was approved by the French, British and American authorities acting on the basis of their supreme authority. The Federal Health Office exercises its functions under a law which was adopted in Berlin in accordance with established procedures. The activities of the Federal Health Office in the Western Sectors of

Berlin do not constitute constitutional or official acts of a state body of the Federal Republic of Germany which contradict the provisions of paragraph 1 of Annex II of the Quadripartite Agreement of 3 September 1971. Neither the location nor the activities of the office in the Western Sectors of Berlin, therefore, contravene any of the provisions of the Quadripartite Agreement.

With reference to the letter of 9 February 1984 (E/CN.7/1984/12) from the Representative of the German Democratic Republic. I wish to point out that States which are not parties to the Quadripartite Agreement of 3 September 1971 are not competent to comment authoritatively on its provisions.

(E/CN.7/1984/12/Add. 1)

In reply to a letter sent to the Secretary-General of the United Nations, as depositary, by the Government of the Soviet Union on its accession to the European Agreement on Main International Traffic Arteries, 1975, in respect of its application to West Berlin, the Governments of the United Kingdom, France and the United States of America made the following statement dated 26 July 1984:

Dans une communication au gouvernement de l'Union des républiques socialistes soviétiques qui fait partie intégrante (annexe IV, A) de l'Accord quadripartite du 3 septembre 1971, les gouvernements de la République française, du Royaume-Uni et des Etats-Unis d'Amérique ont réaffirmé que sans préjudice du maintien de leurs droits et responsabilités relatifs à la représentation extérieure des intérêts des secteurs occidentaux de Berlin et à condition que les questions de sécurité et de statut ne soient pas affectées et à condition que l'extension soit précisée dans chaque cas, les accords et arrangements internationaux conclus par la République fédérale d'Allemagne peuvent être étendus à Berlin conformément aux procédures établies. Pour sa part, le Gouvernement de l'Union des Républiques socialistes soviétiques dans une communication aux gouvernements des trois puissances qui fait également partie intégrante (annexe IV B de l'Accord quadripartite) a fait savoir qu'il ne soulèverait pas d'objections contre une telle extension.

Les procédures établies auxquelles il est fait référence ci-dessus et qui ont été avalisées par l'Accord quadripartite sont prévues *inter alia* pour donner aux autorités des trois puissances la possibilité de faire en sorte que les accords et arrangements internationaux conclus par la République fédérale d'Allemagne qui sont étendus aux secteurs occidentaux de Berlin le soient de telle manière que les questions de sécurité et de statut ne soient pas affectées.

En autorisant l'extension aux secteurs occidentaux de Berlin de l'Accord mentionné ci-dessus, les autorités des trois puissances ont pris les dispositions nécessaires pour que les questions de sécurité et de statut ne soient pas affectées. En conséquence, la validité de la déclaration concernant Berlin faite par la République fédérale d'Allemagne conformément aux procédures établies ne saurait être affectée et ledit Accord continue de s'appliquer aux secteurs orientaux de Berlin avec tous ses effets de droit. L'application des dispositions dudit Accord à Berlin ne contrevient pas aux droits et responsabilités alliées et n'affecte pas les accords, pratiques et procédures quadripartites concernant les routes et la circulation dans Berlin et vers ou à partir de la ville.

(CN 176. 1984. TREATIES—2)

In reply to a letter sent to the Secretary-General of the United Nations, as depositary, by the Government of the Soviet Union on its accession to the Convention on the Contract for the International Carriage of Goods by Road, 1956, in respect of its application to West Berlin, the Governments of the United Kingdom, France and the United States of America made the following statement dated 26 July 1984:

Lorsqu'ils ont autorisé l'extension aux secteurs occidentaux de Berlin de la Convention relative au contrat de transport international de marchandises par route (CMR) du 19 mai 1956, les autorités des trois puissances ont pris les mesures nécessaires pour faire en sorte que les questions de sécurité et de statut ne fussent pas affectées. En conséquence, la déclaration sur Berlin faite par la République fédérale d'Allemagne conformément aux procédures établies, est valide et la Convention s'applique aux secteurs occidentaux de Berlin avec tous ses effets de droit.

Les procédures établies auxquelles il est fait référence ci-dessus ont été avalisées par l'Accord quadripartite. Elles sont destinées *inter alia* à permettre aux autorités des trois puissances de faire en sorte que les accords et arrangements internationaux conclus par la République fédérale d'Allemagne et qui doivent être étendus aux secteurs occidentaux de Berlin le soient de telle façon que les questions de sécurité et de statut ne soient pas affectées.

Nous souhaitons en outre faire remarquer que dans une communication au Gouvernement de l'Union des Républiques socialistes soviétiques qui fait partie intégrante (annexe IV A) de l'Accord quadripartite du 3 septembre 1971, les Gouvernements de France, du Royaume-Uni et des Etats Unis d'Amérique, sans préjudice du maintien de leurs droits et responsabilités relatifs à la représentation extérieure des intérêts des secteurs occidentaux de Berlin, ont confirmé que, à condition que les questions de sécurité et de statut ne soient pas affectées et que l'extension soit précisée dans chaque cas, les accords et arrangements internationaux auxquels la République fédérale d'Allemagne est partie, peuvent être étendus aux secteurs occidentaux de Berlin conformément aux procédures établies. Pour sa part, le Gouvernement de l'Union des Républiques socialistes soviétiques dans une communication aux gouvernements des trois puissances, qui fait également partie intégrante (annexe IV B) de l'Accord quadripartite a fait savoir qu'il ne soulèverait pas d'objection contre de telles extensions.

(CN 175. 1984. TREATIES—1)

The following letter, circulated by the Economic Commission for Europe on 27 January 1984, was received by the Chairman of the eleventh session of the Senior Advisers to ECE Governments on Science and Technology from the head of the Soviet delegation to that session:

With reference to the letter from the representative of the United Kingdom dated 12 October 1983 concerning the convening of the International Waste Recycling Congress in 1984, the delegation of the Union of Soviet Socialist Republics would like to draw attention to the following.

The procedure for convening international conferences in West Berlin is clearly laid down in the Quadripartite Agreement of 3 September 1971. Under that Agreement, such conferences may be convened in West Berlin only if they do not

deal with matters relating to the security and the status of West Berlin, a city which is not a constituent part of the Federal Republic of Germany and is not governed by it. Attempts to organize international conferences in West Berlin under the 'aegis of the Government of the Federal Republic of Germany' are in direct contradiction with those provisions.

Attempts to convene international conferences in West Berlin under the 'aegis of the European Community' are equally illegal, since that city is not under the jurisdiction of the bodies of the Community. The Soviet Union has never accepted the legality of the extension by the Federal Republic of Germany to West Berlin of the Treaty establishing the European Economic Community or other Community treaties. The illegal character of the extension by the Federal Republic to West Berlin of Community treaties is in no way altered by the fact that it was carried out with the agreement of the three Powers. The right and responsibility of the three Powers in respect of West Berlin are based on the quadripartite agreements and decisions taken during the war and the post-war period. Those agreements and decisions did not then and do not now grant the three Powers the right to legalize illegal actions by the Federal Republic of Germany that are not in accordance with the fundamental status of West Berlin.

(SC.TECH./R.148/Add. 1: a letter in support from the head of the delegation of the German Democratic Republic was circulated on the same date as *ibid.* Add. 2)

The following reply from the Permanent Mission of the United Kingdom to the Office of the United Nations at Geneva was circulated on 17 August 1984:

On behalf of the delegations of France, the United States of America and the United Kingdom of Great Britain and Northern Ireland, I have the honour to refer to the communication from the Head of the Delegation of the Union of Soviet Socialist Republics set out in document SC.TECH./R.148/Add. 1.

The Governments of France, the United States of America and the United Kingdom of Great Britain and Northern Ireland reaffirm the position set out in the letter which the United Kingdom Delegation addressed to the Chairman of the Senior Advisers to ECE Governments on Science and Technology on 12 October 1983 (SC.TECH./R.148). In this connection, the three Governments wish to point out that the International Waste Recycling Congress does not have an official character and can in no way contravene the status of Berlin or the provisions of the Quadripartite Agreement of 3 September 1971.

In a communication to the Government of the Union of Soviet Socialist Republics, which is an integral part (Annex IVA) of the Quadripartite Agreement of 3 September 1971, the Governments of France, the United Kingdom and the United States, without prejudice to the maintenance of their rights and responsibilities relating to the representation abroad of the interests of the Western Sectors of Berlin, confirmed that, provided that matters of security and status are not affected and provided that the extension is specified in each case, international agreements and arrangements entered into by the Federal Republic of Germany may be extended to the Western Sectors of Berlin in accordance with established procedures. For its part, the Government of the Union of Soviet Socialist Republics, in a communication to the Governments of the Three Powers

which is similarly an integral part (Annex IVB) of the Quadripartite Agreement, affirmed that it would raise no objections to such extension.

The established procedures referred to above, which were endorsed in the Quadripartite Agreement, are designed *inter alia* to afford the authorities of the Three Powers the opportunity to ensure that international agreements of arrangements entered into by the Federal Republic of Germany which are to be extended to the Western Sectors of Berlin are extended in such a way that matters of security and status are not affected.

The Three Powers, in accordance with established procedures and in so far as is compatible with Allied rights and responsibilities, approved the extension to the Western Sectors of Berlin of the Treaties establishing the European Communities. Consequently, the Western Sectors of Berlin are included in the area of application of these Treaties.

In addition, the three Governments point out that the Soviet communication contains an incomplete and therefore misleading reference to the Quadripartite Agreement of 3 September 1971, which provided that the ties between the Western Sectors of Berlin and the Federal Republic of Germany will be maintained and developed, taking into account that these Sectors continue not to be a constituent part of the Federal Republic of Germany and not to be governed by it.

In relation to the references to 'the whole of Berlin' and to 'Berlin, the capital of the German Democratic Republic' in the Soviet Delegation's communication, the Governments of France, the United States and the United Kingdom, recalling the letter from the Permanent Representatives of the Three Powers to the Secretary-General of the United Nations dated 14 April 1975 (A/10078 and Corr. 1), wish to state the following:

The quadripartite status of Greater Berlin stems from the original rights and responsibilities of the Four Powers. Quadripartite wartime and post-war agreements and decisions based on these rights and responsibilities stipulated that Greater Berlin was to be a special area under the joint authority of the Four Powers entirely distinct from the Soviet zone of occupation in Germany.

Any change in the status of Greater Berlin as reflected in these agreements and decisions would require the agreement of all Four Powers. No such agreement altering the status of Berlin or providing for a special status for any of its Sectors has ever been concluded. The fact that the seat of government of the German Democratic Republic is currently located in the Eastern Sector of the city cannot imply that the quadripartite rights and responsibilities relating to the Eastern Sector are in any way affected. In fact, the Four Powers continue to exercise their quadripartite rights and responsibilities in all four Sectors of the city.

With reference to the communication from the Head of the Delegation of the German Democratic Republic (SC.TECH.R.148/Add. 2), the three Governments wish to point out that States which are not parties to the Quadripartite Agreement of 3 September 1971 are not competent to comment authoritatively on its provisions. They do not consider it necessary, and do not intend, to respond to further communications on this matter from States which are not parties to the Quadripartite Agreement. This should not be taken to imply any change in the position of the three Governments in this matter.

(Ibid., Add. 3)

Following an exchange of Notes of 10 May 1984 between the Governments of France and the Federal Republic of Germany relating to the transfer of a small portion of territory (Mundatland) from France to the Federal Republic of Germany, the following tripartite Note, dated 27 August 1984, was sent to the Federal Republic:

The Embassies of the United Kingdom of Great Britain and Northern Ireland, the United States of America and France present their compliments to the Federal Ministry of Foreign Affairs. Referring to the exchange of Notes of 10 May 1984 between the Ministry and the French Embassy to the Federal Republic of Germany concerning the repeal of paragraph 4 of Article 1 of Ordinance No 212 issued by the French Commander-in-Chief in Germany on 23 April 1949, and to the Ministry's Notes of 12 March 1984—514-553.32 FRA—and to the Notes of 9 May 1984—514-553.32 FRA, which enclosed the text of this exchange of Notes, they have the honour to state the following:

The Governments of the United Kingdom of Great Britain and Northern Ireland, the United States of America and France have considered the exchange of Notes. In the exercise of their rights and responsibilities retained under Article 2 of the Convention on Relations between the Three Powers and the Federal Republic of Germany, the Governments of the Three Powers hereby give the consent required under Article 1 of Chapter One of the Convention on the Settlement of Matters Arising out of the War and the Occupation to such repeal or amendment of legislation enacted by the Occupation authorities as is necessary to enable the provisions of the exchange of Notes to be carried out. They also draw attention to the fact that the provisions of paragraph 1 of Article 7 of the Convention on Relations remain unaffected by the exchange of Notes.

(Text provided by the Foreign and Commonwealth Office)

The following letter, dated 28 September 1984, was transmitted by the Soviet delegation to the Chairman of the executive body for the Convention on Long-Range Transboundary Pollution:

The delegation of the Federal Republic of Germany to the second session of the Executive Body for the Convention on Long-range Transboundary Air Pollution includes Mr. Jost, an official of the Federal Environment Agency of the Federal Republic of Germany, illegally located in Berlin (West).

The appointment of an official of this Agency as a member of the delegation of the Federal Republic of Germany can only be considered an action designed to abuse the authority of the Economic Commission for Europe and obtain legal sanction for State bodies of the Federal Republic of Germany illegally located in Berlin (West).

The existence of such State bodies in Berlin (West) is in direct contravention of the provision of the Quadripartite Agreement of 3 September 1971 to the effect that Berlin (West) is not a constituent part of the Federal Republic of Germany and continues not to be governed by it. Attempts to include such bodies in international co-operation efforts can only cause unnecessary complications in our work and hinder the Economic Commission for Europe in the completion of the tasks before it.

In the light of the foregoing, the delegation of the Union of Soviet Socialist Republics cannot accept as legitimate the appointment of Mr. Jost as a member of the delegation of the Federal Republic of Germany and requests you, Sir, to take the appropriate steps to ensure that this statement is duly reflected in the report of the Executive Body.

(ECE/EB.AIR/4, Annex VI)

In reply, the United Kingdom delegation wrote on the same day:

On behalf of the delegations of France, the United States of America and the United Kingdom of Great Britain and Northern Ireland, I wish to refer to the matter raised by the delegation of the Union of Soviet Socialist Republics in a letter to you dated 28 September 1984.

The establishment of the Federal Environment Agency in the Western Sectors of Berlin was approved by the French, United States and United Kingdom authorities acting on the basis of their supreme authority. These authorities are satisfied that the Federal Environment Agency does not perform in the Western Sectors of Berlin acts in exercise of direct State authority over the Western Sectors of Berlin. Neither the location nor the activities of that Agency in the Western Sectors of Berlin, therefore, contravene any of the provisions of the Quadripartite Agreement.

Furthermore, there is nothing in the Quadripartite Agreement which supports the contention that residents of the Western Sectors of Berlin may not be included in the Federal Republic of Germany's delegations to international conferences; in fact Annex IV of the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the Western Sectors of Berlin in international organizations and at international conferences and that the residents of the Western Sectors of Berlin may participate jointly with participants from the Federal Republic of Germany in international exchanges. Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegation.

Regarding other communications on this subject, I would like to state that States which are not party to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

(Ibid.)

On 7 October 1984, the following Press Statement was issued by the British Military Government in Berlin on behalf of the Allied Commandants:

East German military units participated today in a demonstration in Berlin. Their equipment included main battle tanks, armoured fighting vehicles, rocket carrying vehicles and launchers, and artillery pieces. The Allied Commandants condemn the continuation of such illegal East German military displays, and the violation of the demilitarized status of the City.

In addition military helicopters were flown in violation of quadripartite agreements governing the use of Berlin airspace.

(Text provided by the Foreign and Commonwealth Office)

In reply to a letter from the Soviet delegation, the Mission of the United States of America to International Organizations, Geneva, addressed the following letter, dated 9 November 1984, to the Chairman of the Ad Hoc Meeting on a Regional Strategy for Protection of the Environment and Rational Use of Natural Resources:

On behalf of the delegations of France, the United States of America, and the United Kingdom of Great Britain and Northern Ireland, I should like to address you on the subject raised by the Head of the USSR Delegation in his letter to you of November 9, 1984.

The establishment of the Federal Environmental Agency in the western sectors of Berlin was approved by the French, American, and British authorities acting on the basis of their supreme authority. These authorities are satisfied that the Federal Environmental Agency does not perform in the western sectors of Berlin acts in exercise of direct State authority over the western sectors of Berlin. Neither the location nor the activities of that Agency, in the western sectors of Berlin, therefore, contravenes any of the provisions of the Quadripartite Agreement.

We cannot agree that the involvement of institutions such as the Federal Environmental Agency in any way impedes the work of the ECE.

Furthermore, there is nothing in the Quadripartite Agreement which supports the contention that residents in the western sectors of Berlin may not be included in delegations of the Federal Republic of Germany to international conferences; in fact Annex IV of the Quadripartite Agreement stipulates that, provided matters of security and status are not affected, the Federal Republic of Germany may represent the interests of the western sectors of Berlin in international conferences and that western sectors of Berlin residents may participate jointly with participants from the Federal Republic of Germany in international exchanges. Furthermore, as a matter of principle, it is for the Federal Republic of Germany alone to decide on the composition of its delegation.

Regarding other communications on this subject, I would like to state that States which are not parties to the Quadripartite Agreement are not competent to comment authoritatively on its provisions.

(Text provided by the Foreign and Commonwealth Office)

Letters on similar lines were sent on 14 November 1984 by the United States Mission to International Organizations, Geneva, to the Chairman of the Intergovernmental Group of Experts on Restrictive Business Practices to whom the Soviet delegation had protested over the establishment of the Federal Cartel Office in the western sectors of Berlin, and on 23 November 1984 to the Chairman of the UNEP Ad Hoc Working Group of Experts on the Protection of the Marine Environment against Pollution from Land-based Sources to whom the Soviet delegation had protested against the establishment of the Federal Environmental Agency in the western sectors of Berlin.

In reply to a question about the application to foreign armed forces of the immunity provisions of the Visiting Forces Act 1952 and the

International Headquarters and Defence Organizations Act 1964, the Parliamentary Under-Secretary of State, Home Department, wrote:

Neither Act confers any immunity from the jurisdiction of the United Kingdom courts: they define the circumstances in which, when there is concurrent jurisdiction, the United Kingdom courts and the service courts of a visiting force have primary jurisdiction in criminal cases. Information about the number of occasions on which the United Kingdom's primary jurisdiction has been waived to allow a person to be tried by the service courts of a visiting force is not centrally available.

(HC Debs., vol. 63, Written Answers, col. 224: 5 July 1984; see also *ibid.*, vol. 68, Written Answers, col. 385: 26 November 1984)

**Part Eight: II. D. State territory and territorial jurisdiction—territorial jurisdiction—extra-territoriality**

The following letter, dated 10 June 1983, was sent by Mr A. J. Mantle, Assistant Secretary, Department of Trade, to Dr E. Niederleithinger, Vice-President of the Bundeskartellamt in Berlin:

ROTHMANS INTERNATIONAL plc/MARTIN BRINKMANN AG

The proceedings of the Federal Cartel Office in this case were the subject of consultation between the Federal Cartel Office and the British Department of Trade in January and February 1982. The decision of the Federal Cartel Office (No B6-69 11 00-U-49/81) was issued on 24 February 1982. This decision is now the subject of appeal proceedings in the Berlin Court of Appeal (Kammergericht), and it is understood that an important point at issue will be the reliance of the decision on the 'effects doctrine'—the argument that a transaction outside the Federal Republic can be subject to German jurisdiction by reason of its effects within the Federal Republic. The British Government wishes to amplify its comments on this aspect, made during the consultations referred to.

2 In the view of the British Government a transaction in the shares of two companies incorporated outside a given state may indirectly involve changes in the ultimate control of the subsidiaries of these two companies within the state in question, which in appropriate cases may lead to a finding that for the purposes of that state the two subsidiaries have merged. However, the British Government considers that where enforcement action is taken in such a case penalties or other action must be confined to the territory of the state taking action.

3 It is noted that paragraph 1 of the decision of the Federal Cartel Office in the case referred to above purports to prohibit the acquisition by Philip Morris Inc of the interest in Rothmans Tobacco (Holdings) Ltd, both of which companies are incorporated outside the Federal Republic. While it is understood that the decision is not intended to have an effect outside the Federal Republic, and that its purpose is to create a legal basis for action to be taken within the Federal Republic, the British Government wishes to put on record its firm view that it is not consistent with generally accepted principles of international law for the authorities of one state to assert jurisdiction over the acts of foreign companies occurring outside its territory on the basis of the effects of such acts within its territory.

(Text provided by the Foreign and Commonwealth Office)

Laker Airways Ltd. in liquidation (Laker) commenced civil actions in a United States court against various airlines including TWA. In these proceedings TWA was permitted to serve interrogatories on Laker which was prohibited by Directions made under the Protection of Trading Interests Act 1980 from replying. Under this legislation the Secretary of State for Trade and Industry could give his consent to enable Laker to reply. In a letter dated 9 December 1983 addressed to Laker's London solicitors, Messrs Durrant Piesse, the Solicitor to the Department of Trade and Industry conveyed the Secretary of State's reasons for withholding such consent. This letter read in part:

... quite apart from the question of the infringement of the UK's rights under Bermuda 2 it is also the position of HM Government that the jurisdiction and sovereignty of the United Kingdom would be infringed if it were shown that jurisdiction was being exercised in respect of matters which are not properly the subject of United States jurisdiction. This question would arise where the events complained of occurred wholly outside the United States or where, having regard to the legitimate interests of the United Kingdom, it was unreasonable for the United States unilaterally to exercise or permit the exercise of jurisdiction.

It appears from the proposed answer to interrogatory 28 that certain events in relation to the allegations in the US District Court proceedings are claimed by your clients to have occurred, if they occurred at all, within the United Kingdom and that no suggestion is made that what took place there was not lawful under United Kingdom law. The regulation of the activities of British airlines in the United Kingdom is the concern of the United Kingdom authorities under UK law alone and not that of the authorities or laws of the United States. The proposed answer appears to allege what could amount to a breach of US anti-trust law by your clients, Laker Airways, and another British airline which if given might expose them to prosecution and liability under US law in respect of events which lawfully occurred in the UK. Reference is also made in the proposed answer to interrogatory 28 to meetings with the CAA (attended by Laker Airways and other British Airways) as a result of which advice was given to the Secretary of State in relation to fares of US airlines filed pursuant to Bermuda 2. In the Secretary of State's view it would be unacceptable and an invasion of the proper jurisdiction and sovereignty of the United Kingdom, unjustified by international law, if the national economic policies of the United States were to be enforced by penal laws in respect of the conduct of UK nationals in the United Kingdom particularly when those policies and laws conflict with the policies and laws of the United Kingdom.

(Text provided by the Foreign and Commonwealth Office; for the earlier part of the letter, see Part Ten: II. A. 2., below)

During a debate on the subject of the Prevention of Terrorism (Temporary Provisions) Bill, the Secretary of State for the Home Department, Mr Leon Brittan, stated:

It is important that the United Kingdom should continue to take, and be seen to be taking, a firm stand against terrorism in all its manifestations. Successive Governments have strongly supported, advocated and pursued a policy of close

co-operation with other countries to stamp out international terrorism. That is why we attach so much significance not only to the extension of the powers to international terrorism, but to the absence of a territorial restriction in clause 12(2)(b).

There are a number of precedents for measures related to terrorism to have extra-territorial aspects. A series of Acts have been passed in the past decade or so to enshrine in United Kingdom law the provisions of international conventions designed to deal with specific manifestations of terrorism by making them offences in the United Kingdom, wherever they occur in the world.

The Hijacking Act 1971 and the Protection of Aircraft Act 1973 provide that it is an offence under United Kingdom law for any person of any nationality anywhere in the world to hijack an aircraft or deliberately take measures which would result in the destruction of or damage to an aircraft, or otherwise endanger its safety. Is it unreasonable for us not only to have that on the statute book but to have a policing power which may assist in the detection and conviction of someone guilty of the substantive offence?

Similarly, the Internationally Protected Persons Act 1978 provides that it is an offence for any person, whether a United Kingdom citizen or not, to commit anywhere in the world any act against a Head of State or certain categories of diplomat which would constitute an offence if committed in the United Kingdom.

These measures, and others like them protect us as much as they protect people overseas. If we want other friendly countries to give us the protection that we are prepared to give them, we cannot deny them the protection of this legislation as well. It would be quite wrong if, by restricting the application of clause 12 to acts of Northern Ireland terrorism or even to acts of international terrorism committed in this country, we lost the opportunity of showing that our concern with terrorism is not limited to those of its manifestations which take place on our soil or directly affect our own interests.

(HC Debs., vol. 52, col. 999: 25 January 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

An agreement between the United States and the United Kingdom and Cayman Islands authorities in the form of an exchange of letters has been negotiated within the framework which the United States Deputy Secretary of State, Mr. Dam, and I established last autumn for the handling of problems of extraterritoriality which might affect relations between our two countries. This agreement will provide an acceptable procedure by which the United States authorities may obtain access to documentary information in the Cayman Islands relating to offences connected with traffic in narcotics. For their part, the United States Administration will not enforce federal subpoenas in such cases for the production of documents located in the Cayman Islands. I have today signed the exchange of letters with the United States ambassador. This is a good example of how, with goodwill and understanding, practical solutions can be found for problems in the difficult area of extraterritoriality.

(Ibid., vol. 64, Written Answers, col. 792: 27 July 1984; for the text of the agreement, see UKTS, No. 70 (1984) (Cmnd. 9344))

**Part Eight: III. A. *State territory and territorial jurisdiction—acquisition and transfer of territory—acquisition***

(See Part Eight: II. A. (material on the Falkland Islands), above)

**Part Eight: III. B. *State territory and territorial jurisdiction—acquisition and transfer of territory—transfer***

(See also Part Eight: II. C. (item of 27 August 1984), above)

In the course of a debate on the subject of the agreement with the Chinese Government on the future of Hong Kong, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, stated:

The agreement that has resulted must, of course, be judged against the background of the historical realities that created the problem with which we are concerned today.

In May 1898, the second convention of Peking was signed, in Peking, by the British Minister resident there, Sir Claud MacDonald. I cannot believe that at the time when he signed that document he had any idea of the complexity of the problems that he would be bequeathing to the present generation.

Under that convention, the area which later became known as the New Territories of Hong Kong was leased to Britain for a period of 99 years. Those territories were added to the relatively small areas of Kowloon and Hong Kong Island, which had been ceded to Britain during the previous half-century. That 1898 lease covers 92 per cent. of the land territory of Hong Kong as it is today. It expires, of course, on 30 June 1997. On that date, the New Territories will revert to China.

The ceded territories, the other 8 per cent., have, over the past 87 years, become completely integrated with the leased territories. On their own, they would not be viable. It is those circumstances that compel the need for a specific agreement at this time.

(HC Debs., vol. 69, col. 389: 5 December 1984)

**Part Eight: IV. *State territory and territorial jurisdiction—regime under the Antarctic Treaty***

(See also Part Eight: II. A. (item of 27 July 1984), above)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

Our policy is to maintain and develop the Antarctic treaty system, which is open for accession to any member of the United Nations.

(Ibid., vol. 54, Written Answers, col. 130: 14 February 1984)

In reply to the question whether Her Majesty's Government will make a statement, in view of its claim to King George Island, on the recent Chilean occupation of the island, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

The Chileans have maintained a station on King George Island since 1969. The Antarctic Treaty permits free access for contracting parties to any part of Antarctica. Chilean activities on this island do not prejudice British sovereignty, by virtue of paragraph 2 of article IV of the treaty.

(Ibid., vol. 55, Written Answers, col. 413: 5 March 1984)

In the course of a statement made on 29 November 1984 to the First Committee of the General Assembly of the United Nations, the United Kingdom representative, Dr J. A. Heap, observed:

... it will come as no surprise to colleagues here that the United Kingdom strongly supports the Antarctic Treaty system. The British Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, said so in his address in the General Debate. So did Mr Richard Luce, Minister of State at the Foreign and Commonwealth Office, in his address to this Committee in the disarmament debate. British Ministers have taken a considered position in support of the Antarctic Treaty system on the grounds that it provides a framework within which it is possible to manage that which would otherwise threaten to be unmanageable and, if it became unmanageable, would become a threat to the stability and peace of the area. The governments of other Consultative Parties to the Antarctic Treaty have taken similar positions.

They have needed so to consider their positions, in the face of a challenge from some other Members of the United Nations. I should like to emphasize this point if I may, Mr Chairman. It is not the Antarctic Treaty Consultative Parties who have laid down the challenge but rather, it is those who have wished to raise the matter here in terms indicating their belief that the Antarctic Treaty system needs to be replaced with another arrangement. There has been talk which seems as though some may be willing to take their view to the point of confrontation. I want to make it clear, Mr Chairman, that in the view of the British Government there is no need for confrontation.

...

When I spoke to this Committee last year, Sir, I emphasized, and I quote, 'The Antarctic Treaty Consultative Parties, in managing Antarctica *are denying no one's freedoms in Antarctica other than their own*', I repeat, 'are denying no one's freedoms in Antarctica other than their own'. I went on to say that 'the Antarctic Treaty system overwhelmingly consists of obligations and not of rights' and I reminded the Committee that in accordance with international law no state can be bound by an international agreement in the absence of its freely given consent to be so bound. Against that background let us look at decision making in the Antarctic Treaty fora.

The first point to make is that decisions, in the system as it exists at present, are made by consensus. Such decisions are virtually always concerned with the undertaking of some obligation—that is to say some curtailment, in the interests of all states active in the region, in the freedom of Consultative Parties to act as they choose. That, and only that, is what is meant by the Consultative Parties claim to 'manage' the Antarctic; management which operates as between themselves.

The ultimate power of an Antarctic Treaty state lies in refusing to take part in a consensus under which its freedom would be restricted. It cannot alter the *status*

*quo* in its favour by refusing a consensus; the *status quo* can only be changed if all the parties agree that it should be changed. There are no voting 'sides' or 'blocs' in the Antarctic Treaty system. This leads to a slow progression of decisions; to, successively, a decision to look at a problem, a decision to adopt tentative interim guidelines for voluntary regulation, to a decision to draft something more binding and then, finally to adopt a binding agreement. Such was the road to the conclusion of the Convention for the Conservation of Antarctic Seals. Consideration started in 1964 and finished four meetings later in London in 1972.

In that context let us now look at the position if an outsider were to be brought in to a decision-making process based on consensus, as I have described it. Virtually all decisions have as their ultimate objective to affect what is done in the Antarctic by those who are active there; they are concerned with the undertaking of obligations and the curtailment of freedom to act in Antarctica without paying due regard to the interests of others. As I suggested last year, such decisions are all, ultimately, aimed at ensuring that Antarctica does not become the scene or object of international discord. Against this background it would fly in the face of reason if someone who had no activity in the Antarctic and who could not, himself, effectively discharge the obligations consequent upon the decision under consideration, if he were, by virtue of the exercise of the ultimate decisive power available to him under a consensus system, to prevent the adoption of decisions whose object is to avoid international discord.

Many here will, I am sure, respond to that argument by saying that decision making by consensus is a special case, and that the situation would be entirely different if decision making were by majority vote. I agree. But I fear it would be a recipe for chaos. And it would have no relation either with the theory of State sovereignty or with the practical realities of Antarctica.

Summing up this argument I conclude that, in essence and whatever is the decision making procedure, the existing Antarctic Treaty system whereby binding decisions are taken by those who are going to be affected by them is right. It accords with a sense of natural justice and with international law. No one outside the decision making process is disadvantaged. I conclude, also, that a bid to take part in the making of binding decisions by those who would not be affected by the consequences of those decisions is a bid to exercise power without responsibility. My government could not accept that.

#### [*Antarctic resources*]

I turn now to the question of resources and to the question of what truth there is, if any, in the challenge that the Antarctic Treaty powers are arrogating to their use that which is not properly theirs. It is necessary to distinguish between, on the one hand, renewable living resources in the sea and, on the other hand, non-renewable mineral resources.

Turning first to renewable, living resources, Article VI of the Antarctic Treaty states that the area to which the Treaty applies is all land and ice shelves south of 60° South latitude. It is an area which includes vast stretches of high seas. Because of this, the same Article of the Treaty goes on to say that nothing in the Treaty shall affect the rights or the exercise of the rights by states under international law on the high seas. One of those rights is the right to fish. On its face, therefore, the Treaty itself disposes of any argument that the Treaty Powers have attempted or are attempting to arrogate to their exclusive use the living resources of the

Southern Ocean. But that is not the end of the story, if only for one reason, and that is that there is no consensus amongst the Consultative Parties as to the extent of the high seas in the Treaty Area.

In 1969 fishing activity began in the Southern Ocean targeted on species other than whales—mainly on fin fish and krill. The sudden appearance of distant water trawler fleets in Antarctic waters was largely due to the establishment of 200 mile coastal state jurisdiction over the waters elsewhere in the world where these fleets used to fish. The appearance of these fleets posed two threats, one to the peace of the area and the other to the resources themselves. The threat to the peace arose from the possibility of a conflict between claimant and non-claimant states about the exercise of coastal state jurisdiction in Antarctica. If this could not be solved there would be no way of avoiding the threat that the sad story of overexploitation of fish stocks elsewhere in the world might be repeated in the Antarctic.

The Consultative Parties responded to that threat by negotiating and concluding the Convention for the Conservation of Antarctic Marine Living Resources. This Convention accords no rights to the parties to it—it only imposes obligations. Its main purpose is to ensure that the Antarctic marine ecosystem will in the future be as nearly as possible what it is today. No country in the world that wishes to fish those waters is prevented from doing so. There is, therefore, no substance in a challenge that living resources are being arrogated to the exclusive use of the Consultative Parties or the parties to the Convention.

...

The Consultative Parties are negotiating towards a mineral regime against a background of five uncertainties, that is virtually complete ignorance as to *what* minerals there are, *where* they are, *when* they will be exploited, *who* will do it and *whether*, indeed, it will ever happen. Mr Chairman, the distinguished Permanent Representative of Malaysia made excellent debating use yesterday of an article recently published in 'Foreign Affairs'. But I can assure the Committee that there is no real substance to his arguments. British oil companies do not view the prospects of Antarctic oil as anything more than speculative, as indeed are the prospects in all sorts of other areas on which they, nevertheless, keep a watching eye. The purpose of the Consultative Parties is to avoid mineral activities becoming a threat to the peace—or to the environment—of Antarctica. Their problem is to conclude, against a background of ignorance, a regime with sufficient strength to meet whatever challenges may lie in store in the future and sufficient flexibility to cope with changing circumstances, new perspectives and the entirely unexpected. The bottom line is that no one will ever get any minerals out of the Antarctic unless the peace is maintained. The situation in Antarctica, leaving aside the important factor of the existing territorial claims, is very different from that on the deep sea bed.

[*Challenge to a treaty system.*]

I turn now to the third of my themes. It concerns the wider consequences of a challenge to an existing series of treaties. There are a large number of international agreements that have similarities with the constituent parts of the Antarctic Treaty system. There are regional arrangements such as the OAS and the OAU, or those such as CARICOM, the EEC, or Comecon. There are many agreements which are about the utilization of resources in a given region to which states not necessarily contiguous to one another or to the resource in question, are

parties. The multitude of fishery agreements are a good example; The Conventions for the Conservation of Antarctic Seals and Antarctic Marine Living Resources come into this category. There are also large numbers of agreements which are concerned, in one way or another, with the maintenance of peace, with demilitarization and nuclear free zones; the Antarctic Treaty comes into this category. Some of these agreements had their beginnings in the United Nations or in UN Specialized Agencies. Many of them were born outside the UN system altogether. The common feature is that they were negotiated between the states who had a direct interest in the subject matter of the agreement. Although, of many such agreements it could be said that other states had an interest, such interest was indirect and was of a different order of magnitude to the original negotiating states. If any such states were sufficiently to develop its interest there is normally a mechanism, as in many fishery agreements, for them to become full parties. The fundamental characteristics of all such agreements are common to the Antarctic Treaty system.

In the Antarctic Treaty system, if I may remind you, Mr Chairman, we have a situation which allows for all those active in the area—all those who have a direct interest in ensuring that all operate there in accordance with the same constraints—to undertake the same obligations.

Now let us look at the challenge being made as shown by some of the views of states which have been made available to the Secretary General. We have difficulty in interpreting such views as other than an attempt to put the United Nations in the position of arbiter of the obligations undertaken by states in treaties initiated, concluded and operating outside the United Nations system. We have no objection to the discussion of Antarctica here within the General Assembly but we cannot accept a situation which could call into question the fundamental premise upon which treaties are negotiated. I refer to the principle of *pacta sunt servanda*. This principle is a cornerstone of British foreign policy and it is not acceptable to my Government that Members of the United Nations should attempt to call it into question.

I wish to make clear the limits of my Government's objections. We have no objection to the present discussion of Antarctica in this forum. We have no objection in principle if Member States put forward here realistic suggestions about what should or should not happen in Antarctica and what the Antarctic Treaty Consultative Parties should or should not do. While we believe that such arguments would be better made inside the Treaty system rather than from outside it, that is, for present purposes, a different point. But states who are not parties to a binding treaty ought not to be able, through the United Nations, to call into question the obligations of states parties to the Treaty. Such a situation, if it were to arise, would be obviously intolerable. No doubt the principle applies with special force to a Treaty which, on its face, is intended to advance the principles and objectives of the United Nations. The British government is convinced that the Antarctic Treaty does serve the principles and objectives of the United Nations and, therefore, it will maintain its opposition to attempts by states not members of that Treaty to put in question the obligations of Parties under it.

[*Scientific research in Antarctica*]

I turn now to the last of my themes. There will, I am sure, be no disagreement among us in this Committee about the necessity for continuing scientific research

in Antarctica. Whether future decisions about the uses of Antarctica are to be made wisely is dependent on whether we know enough about Antarctica to be reasonably sure that our predictions as to how the Antarctic environment will react to a given use are soundly based. What we know about the Antarctic depends on scientific research.

It must, therefore be of great importance to all of us here that the research effort in Antarctica does not decrease. As I said in the United Kingdom statement to this Committee last year, Antarctic scientific research is now a very expensive game. Before the surge of activity brought about by the International Geophysical Year expenditure on scientific research in Antarctica was measured in a few hundreds of thousands of dollars annually; now it is measured in hundred of millions. Then there was little research being done; it was unco-ordinated and in some instances secretive. Now there is a vast amount being done and some of it is of a highly sophisticated nature; it is co-ordinated through the international, non-governmental Scientific Committee on Antarctic Research and, in accordance with the provisions of the Antarctic Treaty, the results are made freely available. The results of British scientific research in Antarctica are to be found in more than 600 libraries throughout the world.

I believe it is now widely recognized in this Committee that the Antarctic Treaty was above all a reaction to the prospect of unbridled competition between states leading to the possibility of strife and violence. What the Antarctic Treaty did is to take as given that states would continue to compete in Antarctica in pursuit of what each viewed as being its national interest. The Treaty then went on to establish certain limits within which the pursuit of such national objectives must abide.

Those limits require that, in the pursuit of national interest, force cannot be used, nuclear explosions and the dumping of radioactive waste cannot take place, the results of scientific research cannot be kept secret, activities cannot advantage a state in pursuit of its view as to whether sovereignty can or cannot be exercised in Antarctica, and activities in Antarctica cannot be reserved from the scrutiny of on-site inspection. Within those constraints it has been possible for any state party to the Antarctic Treaty to pursue its national interest. All the spurs of national pride and prestige have operated to push states towards ever greater efforts.

But these constraints were well devised. For 25 years they have had the effect of channeling all such nationalistic aspirations into the pursuit of knowledge. The world has greatly benefitted from a treaty which in effect says 'we know you states are going to compete but things have been so arranged that you can only compete towards constructive rather than destructive ends'. Take away the possibility or the objectives of competition, however remote they may be, and the scientific effort will wither. No one, whether he be a scientist or a state, goes to the Antarctic without a dream.

... let me, if I may, try to sum up.

At the heart of my government's position is that old adage that you can take a horse to the water but you cannot make him drink. Those challenging the Antarctic Treaty system require that the Antarctic Treaty Consultative Parties should agree to dismantle the system and participate in the building of another system. My Government sees no objectively sound reason, arising from the Antarctic Treaty system itself, to do this. We hear the universalist cry from the challengers. We are amongst the first to support the application of the principle of universality

in cases where it applies. In this case we see only an abstract philosophical basis for the cry. This philosophical point can be met, as can other points made in this debate, by the development of the Antarctic Treaty system from within.

...

(Text provided by the Foreign and Commonwealth Office)

In reply to a question about the transfer to Chile of the British Antarctic base at Adelaide Island, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Adelaide station is an abandoned Antarctic base whose facilities were owned by the Natural Environmental Research Council and for which it had no further use. We therefore agreed to a proposal from the Chilean Antarctic Institute that Chile might use and assume responsibility for these facilities, within the framework of article IV of the Antarctic treaty.

...

Chile has accepted that its assumption of responsibility for the facilities at Adelaide station is within the framework of the provisions of the Antarctic Treaty and, in particular, of article IV. We do not consider that British sovereignty over the British Antarctic territory is in any way prejudiced by this arrangement.

(HC Debs., vol. 69, Written Answers, col. 599: 13 December 1984)

#### **Part Nine: I. A. *Seas, waterways—territorial sea—delimitation***

In the course of a debate on the subject of the United Nations Law of the Sea Convention, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... we are continuing to examine the extension of the United Kingdom's territorial sea in the context of the outcome of the law of the sea conference. The question of territorial sea is only one aspect of the linked questions of the law of the sea.

We have been considering and making preparations for an extension to 12 miles. We hope to introduce this with other changes in the context of a satisfactory outcome of the United Nations Law of the Sea Conference. This would always have been the most satisfactory context in which to make such an extension—especially in connection with the related questions of the straits to which my noble friend also referred. Extension to 12 miles has the effect that a number of important straits become territorial sea across their whole width, and the convention takes full account of this. Extension of the territorial sea and its implications is only one of the interlinked issues of the law of the sea which we have to keep under review as the situation develops.

(HL Debs., vol. 448, col. 283: 15 February 1984)

In reply to the question whether Her Majesty's Government recognizes other States' twelve-nautical mile territorial seas, the Minister of State, Foreign and Commonwealth Office, wrote:

At present the United Kingdom does not recognize claims to territorial seas extending to 12 nautical miles.

(Ibid., vol. 453, col. 136: 18 June 1984)

**Part Nine: I. B. 1.** *Seas, waterways—territorial sea—legal status—right of innocent passage*

In reply to a question, the Minister of State for the Armed Forces wrote:

Soviet vessels enjoy the right under international law of innocent passage through the territorial sea of the United Kingdom and other European countries. (HC Debs., vol. 57, Written Answers, col. 664: 5 April 1984)

In reply to a later question, the same Minister wrote:

Under international law, all ships enjoy the right of innocent passage in the territorial sea of the United Kingdom.

(Ibid., col. 665)

**Part Nine: I. B. 2.** *Seas, waterways—territorial sea—legal status—regime of merchant ships*

The following question was asked in the House of Lords:

What is the status in (a) domestic, and (b) international law of small submersibles (naval, commercial, or research), which may be either remotely controlled or manned, and may or may not be in permanent contact with the seabed, operating within United Kingdom internal or territorial waters, or on or over the United Kingdom continental shelf?

In reply, the Government Minister wrote:

Any manned mobile submersible apparatus which is operated within United Kingdom waters or from a British-registered ship is required to be registered with the Department of Transport. Such craft and supporting apparatus are prohibited from operating without a valid safety certificate issued by my right honourable friend after satisfactory survey. Further regulations relating to their safe operation are being prepared. Legislation regulating offshore installations and activities on the United Kingdom continental shelf affects the use of submersibles in certain respects. Naval submersibles are not covered by merchant shipping legislation.

There are no international conventions relating specifically to submersibles, but such craft are subject to the provisions of the International Convention for the Prevention of Pollution from Ships (MARPOL 1973/78) and the 1958 Convention on the Territorial Sea.

(HL Debs., vol. 447, col. 994: 6 February 1984)

**Part Nine: I. B. 3.** *Seas, waterways—territorial sea—legal status—regime of public ships other than warships*

(See Part Nine: I. B. 2., above)

**Part Nine: I. B. 4.** *Seas, waterways—territorial sea—legal status—warships*

(See Part Nine: I. B. 2., above)

**Part Nine: I. B. 5.** *Seas, waterways—territorial sea—legal status—bed and subsoil*

In reply to the question what permission is required to store dangerous or hazardous materials in ships in British waters, the Government Minister in the House of Lords wrote in part:

If the ship were permanently moored (as distinct from anchored) within United Kingdom waters it could require the consent of [a Secretary of State] under Section 34 of the Coast Protection Act 1949, and it would require the approval of the owners of the seabed (usually the Crown Estate Commissioners). If the ship were in normal service the Merchant Shipping (Dangerous Goods) Regulations 1981 would apply to it while it was in United Kingdom waters. But if it were not in normal service the regulations might not apply in some circumstances.

(HL Debs., vol. 457, cols. 1304-5: 4 December 1984)

**Part Nine: II.** *Seas, waterways—contiguous zone*

In reply to the question whether Her Majesty's Government recognizes other States' twelve-nautical mile contiguous zone outside a twelve-nautical mile territorial sea, the Minister of State, Foreign and Commonwealth Office, wrote:

We recognize coastal state jurisdiction in accordance with international law in contiguous zones within a limit of 12 miles from the baselines. Recognition of contiguous zones extending to 24 miles is among the questions being considered in connection with the possible extension to 12 miles of the territorial sea of the United Kingdom.

(Ibid., vol. 453, cols. 136-7: 18 June 1984)

**Part Nine: III.** *Seas, waterways—internal waters, including ports*

(See also Part Nine: I. B. 2. and Part Nine: I. B. 5., above; and Part Nine: VII. G. (item of 22 November 1984), below)

Her Majesty's Government was asked the following question in the House of Lords:

Whether they recognize any of the Arctic Seas—that is the Barents, Kara, Laptev, East Siberian, and Chukchi Seas—as 'historically belonging to the USSR' and therefore to be deemed 'internal waters', from the outer limit of which 'territorial waters' of twelve miles and an 'exclusive economic zone' of 200 miles would be claimed by the Soviet Union; and, if they do not, whether they will urgently recall this fact to the Soviet Union, which is in process of delineating the 'state boundary of the USSR' in the Arctic Ocean, and appears to claim under its 'Law on the State Boundary of the USSR', which entered into force March 1st 1983 (Article 6(iv)) '... seas and straits, historically belonging to the USSR' as 'internal waters'.

In reply, the Minister of State, Foreign and Commonwealth Office, wrote:

The legislation which came into force in 1983 substantially follows the legislation of 1960. The United Kingdom protested against the 1960 Decree and we shall not be inhibited from making similar observations in future if official Soviet assertions of territorial claims are in our view contrary to international law. But the exact limits of Soviet claims to waters along the Arctic coast have not been stated by the Soviet authorities and we are therefore unable at present to take a view on the question of how far they may be in accordance with international law. (Ibid., vol. 448, col. 1144: 27 February 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have made clear to the United States Government that we are committed to the principle of freedom of navigation and deplore the mining of Nicaraguan ports. (HC Debs., vol. 58, Written Answers, col. 470: 13 April 1984)

In reply to a question, the Parliamentary Under-Secretary of State, Department of Transport, wrote:

All ships registered in the United Kingdom and in any dependent territory to which international conventions have been extended are required to comply with the standards laid down in these conventions. Ships which do not comply are subject to penalties, including detention until serious deficiencies have been rectified. I am considering further legislation to extend and improve the enforcement of safety requirements in dependent territories. I also attach particular importance to the inspection of foreign ships visiting our ports to ensure that they do not escape the rigorous safety requirements imposed on our own ships. If my hon. Friend has reason to believe there are British ships operating which do not comply I would be glad to receive details.

(Ibid., vol. 61, Written Answers, col. 50: 4 June 1984)

In reply to a question about the enforcement of international and domestic regulations relating to hazardous cargo, the Government Minister in the House of Lords wrote:

The shipment of nuclear, oily, noxious, toxic or otherwise hazardous cargo by sea is regulated internationally by the International Convention for the Safety of Life at Sea 1974 (SOLAS) and the related International Maritime Dangerous Goods Code, the International Convention for the Prevention of Pollution from Ships 1978-79 (MARPOL) and the International Atomic Energy Agency Regulations. The international instruments are reflected in domestic law in the Merchant Shipping (Dangerous Goods) Regulations 1981 and in the Merchant Shipping (Prevention of Oil Pollution) Regulations 1983, which apply to United Kingdom ships wherever they are and to any foreign ship when in a United Kingdom port. These regulations are enforced by the Department of Transport.

In port, current harbour by-laws are made under powers derived from the Explosives Act 1875, the Petroleum (Consolidation) Act 1928 and private legislation such as the Port of London Act 1968. The Government expect to make new regulations under the Health and Safety at Work etc. Act 1974 next year to control the carriage, loading and unloading of dangerous substances in harbour

areas. These regulations will be enforced by harbour authorities and the Health and Safety Executive.

(HL Debs., vol. 457, cols. 1209-10: 3 December 1984)

**Part Nine: IV. *Seas, waterways—straits***

(See also Part Nine: I. A. (item of 15 February 1984), above)

In the course of a reply, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Kingdom attaches importance to the freedom of navigation in the Gulf including passage through the Straits of Hormuz.

(HC Debs., vol. 53, Written Answers, col. 485: 6 February 1984; see also HL Debs., vol. 449, col. 1218: 21 March 1984)

In reply to the question:

Whether in the light of the answers given by Foreign Office Ministers in July 1976 concerning the transit of the Soviet aircraft carrier 'Kiev' through the straits from the Black Sea into the Mediterranean under the misleading description, 'anti-submarine warfare cruiser', the Government will now raise with the Government of Turkey, and the other signatories to the Montreux Convention, the Soviet Union's presumable intention to send the nuclear powered aircraft carrier reputedly now being built in the Black Sea through the straits, in spite of the terms of the convention, which forbid the passage of aircraft carriers,

the Minister of State, Foreign and Commonwealth Office, wrote:

Questions regarding the application of provisions of the Montreux Convention are discussed from time to time with other parties to the convention, including the Turkish Government, which is responsible for the supervision of its implementation. As the noble Lord will be aware, our view of the application of the convention to aircraft carriers is not shared by all the other parties.

(HL Debs., vol. 449, cols. 1459-60: 22 March 1984)

In reply to the question which of the straits around the British Isles can properly be described as 'international' in the sense of the United Nations Law of the Sea Convention, the Minister of State, Foreign and Commonwealth Office, wrote:

We see no need to take a position on this question at present in view of our well-known attitude to the United Nations Law of the Sea Convention.

(Ibid., vol. 452, col. 484: 4 June 1984)

**Part Nine: VII. A. 1. *Seas, waterways—the high seas—freedom of the high seas—navigation***

In the course of a debate in the House of Lords on the subject of the Iran-Iraq conflict, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

We were pleased that on 1st June the United Nations Security Council adopted a resolution calling on all states to respect, in accordance with international law, the right of freedom of navigation.

(Ibid., col. 882: 11 June 1984; see also HC Debs., vol. 61, col. 763: 12 June 1984; ibid., vol. 63, col. 1044: 11 July 1984)

**Part Nine: VII. D. *Seas, waterways—the high seas—visit and search***

In reply to the question:

Whether [Her Majesty's Government] consider it in accordance with international law for a merchant ship on the high seas to be questioned about its origin, destination, and cargo, by a warship of another state,

the Minister of State, Foreign and Commonwealth Office, wrote:

The conditions under which a warship which encounters a foreign merchant ship on the high seas may board it are set out in the Geneva Convention on the High Seas of 1958, in particular Article 22.

(HL Debs., vol. 449, col. 1460: 22 March 1984)

**Part Nine: VII. G. *Seas, waterways—the high seas—pollution***

In reply to the question whether Her Majesty's Government recognizes the Canadian 100-nautical mile pollution control zone, the Minister of State, Foreign and Commonwealth Office, wrote:

We reserved our rights in 1970 in connection with the legislation establishing such a zone. We continue to see difficulties in the provisions of that legislation.

(Ibid., vol. 453, col. 137: 18 June 1984)

In reply to a question asking what these difficulties are, and what advice Her Majesty's Government would give to British shipowners proposing to enter the area, the Government Minister in the House of Lords wrote:

If the term 'pollution control zone' is intended to mean 'special area' as defined in the Annexes of MARPOL 73/78, then it is assumed that in the first instance the Canadian authorities would submit their proposals for approval at the International Maritime Organization (IMO). For this purpose they would be expected to establish that in relation to the oceanographical and ecological condition of the area concerned, special area status, or its equivalent, was essential for the purpose of its environmental protection. They would then be required to ensure that adequate reception facilities for oil residues and other wastes were provided at ports and harbours bordering the 'special area' zones.

In the event of these objectives being obtained by the Canadian authorities then British ship owners preparing to enter the area would be expected to comply with the 'special area' provisions.

(Ibid., vol. 457, col. 1547: 6 December 1984)

In reply to a question, the Government spokesman in the House of Lords, Lord Brabazon, stated:

... the Government's policy is to stress to the shipping industry the need to avoid disposal of garbage at sea and to recommend voluntary compliance with the provisions of Annex V of the International Convention for the Prevention of Pollution from Ships, known as MARPOL 73/78. It is our policy also to seek at the International Maritime Organization to amend the content of Annex V to a form more acceptable to the United Kingdom, so as to enable the United Kingdom to ratify this annex at the earliest possible time.

(HL Debs., vol. 457, col. 679: 22 November 1984)

Lord Brabazon later observed on the same matter:

Even if we signed Annex V, we would only be able to get at shipping either under our own flag or which called in at our ports.

(Ibid., col. 681)

**Part Nine: VII. H. *Seas, waterways—the high seas—jurisdiction over ships***

In reply to a question on the subject of marine 'pirate radio' stations, the Parliamentary Under-Secretary of State, Department of Trade and Industry, wrote:

Radio Caroline and Radio Laser, the pirate stations in question, are vessels anchored in international waters. We have no jurisdiction to enable us to board the vessels and put an end to the stations' activities. However, information about contraventions of the Marine, Etc., Broadcasting (Offences) Act 1967 within this country is being investigated and where appropriate the Director of Public Prosecutions will be asked to consider prosecuting offenders.

(HC Debs., vol. 56, Written Answers, col. 323: 19 March 1984)

**Part Nine: VIII. *Seas, waterways—continental shelf***

(See also Part Nine: I. B. 2., above, and Part Nine: X. (item of 18 June 1984), below)

In reply to the question whether Her Majesty's Government recognizes other States' inclusive [*sic*] rights to exploration and exploitation of the bed of their continental shelf, and if so where, the Minister of State, Foreign and Commonwealth Office, wrote:

We recognize sovereign rights of other states over the continental shelf in accordance with international law as reflected in the Geneva Convention on the continental shelf 1958 and subsequent developments.

(HL Debs., vol. 453, col. 137: 18 June 1984)

In reply to the question what is the nature of Her Majesty's Government's apparent claims to the continental shelf around Rockall as depicted in the Department of Energy's *Brown Book*, and what are the foundations of these claims in international law, the Minister of State, Foreign and Commonwealth Office, wrote:

The areas depicted in the *Brown Book* are ones which have been designated as British by Orders in Council under the Continental Shelf Act 1964. The

foundations in international law include international agreements (notably the Geneva conventions 1958), decisions about the delimitation of the continental shelf by the international courts, such as the International Court of Justice, and the practice of states. In particular, the United Kingdom has a valid claim to the Rockall Plateau on the basis of the criterion of natural prolongation.

(Ibid., vol. 458, col. 635: 18 December 1984)

In reply to the further question whether the claim to Rockall has been disputed or accepted by other governments, the Minister wrote:

The boundaries of the continental shelf appertaining to the United Kingdom and lying to the west of Scotland have not yet been established with the other states concerned. Discussions continue with the Irish, Icelandic and Danish Governments.

(Ibid.)

**Part Nine: IX. Seas, waterways—exclusive fishery zone**

(See also Part Nine: X. (Anglo-French Convention of 25 October 1983), below)

In reply to a question, the Minister of State, Department of Agriculture, Fisheries and Food, wrote in part:

It is the responsibility of each individual Member State to enforce the provisions of the common fisheries policy within its own fishery limits. . . . one of our top priorities is to ensure that enforcement is effective in relation to all Community fishermen. My right hon. Friend and I have said on many occasions that the key to this is the European Commission's inspectorate of inspectorates whose main task is to ensure that all member states apply the policy consistently and rigorously throughout the Community, and we have therefore been in the forefront in persistently pressing for progress on this issue.

(HC Debs., vol. 53, Written Answers, col. 95: 30 January 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The following dependent territories have established 200-mile fishing zones:

- Anguilla
- Bermuda
- British Virgin Islands
- Cayman Islands
- Montserrat
- Pitcairn, Ducie, Henderson and Oeno Islands
- St. Helena and Dependencies
- Turks and Caicos Islands

The following dependent territories have not done so:

- British Antarctic Territory
- British Indian Ocean Territory
- Falkland Islands

Falkland Islands Dependencies  
Gibraltar  
Hong Kong

In considering the extension of fishing limits to 200 miles by dependent territories, we have to take into account all the factors relevant to each case such as the wishes of the inhabitants and geographical and political considerations.

(HL Debs., vol. 449, col. 1459: 22 March 1984)

**Part Nine: X. *Seas, waterways—exclusive economic zone***

In the course of a letter dated 18 June 1979 addressed to the United States Secretary of State by the Ambassador of Peru to the United States at the time of the deposit of the Peruvian instrument of ratification of the International Convention for the Regulation of Whaling, signed at Washington on 2 December 1946, the following passage appeared:

Acting on instructions from the Peruvian Foreign Ministry in depositing the instrument of ratification I wish to leave on record the statement of my Government that this cannot be interpreted as detrimental to or restrictive of the sovereignty and jurisdiction which Peru exercises up to a limit of two hundred miles off its coast.

The British Ambassador to the United States, Sir Oliver Wright, responded in a letter dated 1 March 1984 addressed to the Secretary of State as follows:

I have the honour to refer to the statement made by Peru on 18 June 1979 on ratifying the International Convention for the Regulation of Whaling, done at Washington on 2 December 1946, and acting upon the Instructions of Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, to state that the Government of the United Kingdom of Great Britain and Northern Ireland considers that the claim by the Government of Peru that Peru exercises unrestricted sovereignty and jurisdiction to a limit of two hundred miles off its coast has no validity under international law.

I have the honour to request that you circulate the contents of this Note to the Governments of States concerned with the said Convention, with the explanation that the Peruvian statement only recently came to our notice.

(Texts provided by the Foreign and Commonwealth Office)

On 25 October 1983, the Governments of the United Kingdom and France signed a Convention on Maritime Boundaries. The Convention, which entered into force on 12 April 1984, contains a preamble in which the Parties recognize 'the need to delimit in a precise and equitable manner the maritime areas around the Tuamotu Archipelago on the one hand and Pitcairn, Henderson, Ducie and Oeno Islands on the other, over which the two States respectively exercise sovereignty'. Article 1 of the Convention reads:

The boundary between the French economic zone around the Tuamotu Archipelago and the fisheries zone around Pitcairn, Henderson, Ducie and Oeno

Islands is based on a line of equidistance. This line has been determined using the baselines from which the territorial sea of each country is measured. In the case of France, the baseline is drawn in accordance with the Laws of 24 December 1971 and 28 December 1976. In the case of Pitcairn, Henderson, Ducie and Oeno Islands, the baseline is the low-water mark.

Article 2 provides that the boundary line determined in accordance with Article 1 is formed by loxodromic arcs linking six specific points identified by their co-ordinates expressed in the geodesic reference system WGS 72 (World Geodesic System).

(UKTS, No. 56 (1984) (Cmnd. 9294))

In reply to the question whether Her Majesty's Government recognizes other States' 200-nautical mile exclusive economic zones, the Minister of State, Foreign and Commonwealth Office, wrote:

Yes, but the delimitation of the exclusive economic zone and the extent of jurisdiction claimed within it must conform with the rules of international law.

(HL Debs., vol. 453, col. 136: 18 June 1984)

In reply to the question what rights Her Majesty's Government recognizes as pertaining to coastal States to control scientific research in their exclusive economic zone or on their continental shelf, the Minister of State, Foreign and Commonwealth Office, wrote:

We recognize that a coastal state may refuse consent for marine scientific research where, in particular, the research concerns fisheries and the resources of the seabed.

(Ibid., col. 137: 18 June 1984)

In reply to the question what rules of international law Her Majesty's Government hold to determine:

- (a) the delimitation of the exclusive economic zone and the extent of coastal state jurisdiction within the zone; and
- (b) the right of a coastal state to refuse consent for marine scientific research,

the Minister of State, Foreign and Commonwealth Office, wrote:

The concept of the exclusive economic zone has developed into customary international law. The delimitation of that zone, the extent of coastal state jurisdiction within it, as well as the rights of a coastal state with regard to marine scientific research are governed by rules of customary international law.

(Ibid., vol. 457, col. 1301: 4 December 1984)

## **Part Nine: XII. Seas, waterways—*bed of the sea beyond national jurisdiction***

(See also Part Nine: XIV., below)

In the course of a debate in the House of Lords on the subject of the United Nations Law of the Sea Convention, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

. . . I should like to make clear that the United Kingdom would like to see a comprehensive regime on marine matters which was acceptable to all, and that we had hoped that the third United Nations Conference on the Law of the Sea would produce a text which could be adopted by consensus. As the noble Lord, Lord Caradon, said, there was a unanimous vote of 99 to zero in 1967 for the first resolution on the seabed beyond national jurisdiction; this broad support was maintained in 1970, when a Resolution on the principles governing this area of the seabed was adopted. It envisaged that an international regime would be established by 'an international treaty generally agreed upon'.

On many issues which came before the Law of the Sea Conference from 1973 onwards, a general consensus was maintained and a general understanding that it was appropriate to deal with these issues in a single convention. . . . But unfortunately, in the late stages, this consensus was not maintained. Agreement was not reached on the provisions relating to deep seabed mining. The text of the convention was put to a vote in which the United Kingdom abstained. In the course of the debate I was asked by the noble Lord, Lord Kennet, about the numbers of those who had signed the convention: 132 countries have signed the convention and eight states have ratified it.

The United Kingdom's position remains as set out in my noble friend Lord Belstead's Statement of 2nd December 1982, made shortly before the convention was opened for signature. There is much in the convention that is helpful: for example, the provisions relating to navigation, the continental shelf and pollution. But for the United Kingdom the convention's deep sea mining regime is unacceptable as it stands. The United Kingdom cannot participate in the seabed regime on the present terms, and for that reason the United Kingdom cannot sign the convention unless a satisfactory regime for deep seabed mining can be obtained. . . . It has not been our practice to sign a convention where there is not a present prospect of our ratifying the current text.

In the course of his speech the noble Lord, Lord Caradon, inferred that we were simply following the United States in this line of argument. I should like to assure him that this is not the case and that as I continue with my remarks I shall set out the reasons why we have taken this view. The provisions which deal with deep seabed mining are highly complex and contain important undesirable features. The proposed seabed régime contemplates a disproportionately weighty structure for the International Sea-bed Authority. This might have virtually universal membership, with an assembly that would meet annually, a council, subsidiary organs and a secretariat. It would produce an over-elaborate and expensive system for regulating what, in practice, will be a very small number of deep seabed mining operations. The needs of the industry are, in any event, not yet fully understood. The necessary technology is still being developed. . . . It is therefore difficult to draw up fully detailed conditions for these operations.

The international organisation known as the Enterprise, which would carry out mining operations for the authority, would do so on privileged and costly terms. The initial industrial and administrative costs of the Enterprise would be financed by the states parties to the convention. It would cost at least £1,000 million to set up a full commercial operation, and the United Kingdom share of this would be of the order of £50 million. If the technology for the operations of the Enterprise were not available on the open market, it would be compulsorily acquired from commercial operators. Commercial operators who wished to obtain an

authorisation from the authority to engage in deep seabed mining operations would be obliged to provide and explore an additional fully explored mine site for the Enterprise or for developing countries to exploit. The output of operators would be controlled by the authority and high licensing fees would be charged. The undesirable regulatory principles for this régime and the provision for compulsory transfer of technology could set damaging precedents for future negotiations on industrial matters. Another serious flaw lies in the provisions for adopting amendments in a review conference to be convened 15 years after the start of seabed operations. We cannot accept a system that would be open to change, as the convention would allow, even if all states which had a direct interest in seabed mining voted against such a change.

Support for this régime would require a very large financial commitment, not only from states but also from commercial operators. With the seabed mining provisions unaltered and in force, the cost of ratification for the United Kingdom would be between £3.5 million and £8 million for fixed administrative costs and £1.5 million to £1.8 million per annum for running administrative costs, in addition to the cost of the Enterprise's mining site. These figures could increase by 33 per cent. if the United States maintained its position of non-involvement. For the operators, if the return on investment was as low as 5 per cent. the authority, under the present régime, would take 40 per cent. of this. If the return for the operators was 20 per cent., the authority would eventually take 70 per cent. of this. . . . This burden, and the complexity and over-regulatory nature of the régime, would be likely to discourage investment. Far from producing wealth to be shared out, therefore, the present mining provisions may well prevent any advantage resulting from the potential benefits from the seabed.

What is important is not so much the intention behind the convention's mining system, of sharing among all nations the mineral wealth of the seabed, but whether in practice it would achieve this. Very often, those who put forward adherence to the convention as a factor for stability and a constructive approach to international relations argue on the basis of the non-controversial aspects of the convention— aspects with which, as I have already indicated, the United Kingdom is in agreement—and the intentions behind the mining régime without due consideration of the practical difficulties which this régime could create. As the mining régime now stands, it might remove the incentive to carry out this costly and novel type of operation and remove the profitability on which the sharing of benefits would depend.

I have already indicated that the United Kingdom is not simply following the United States in her policy on this matter. We are not alone in finding these elements unacceptable, because 37 other countries have not signed the convention. Most of the leading industrialised countries, including many Community countries, have objections. One of the points which the noble Lord, Lord Kennet, put to me related to the position of the Community countries. I can confirm that five Community members—France, Ireland, Denmark, Greece and the Netherlands—have signed the convention, while five others—the United Kingdom, the Federal Republic of Germany, Italy, Belgium and Luxembourg—have not. The other European non-signatories, and several of the signatories, are critical of the deep seabed mining provisions of the convention. These countries, like the United Kingdom and unlike the United States, are attending the preparatory commission. Our involvement with the commission's work shows that the United

Kingdom has not turned its back on the convention but is seeking to improve the deep sea mining régime. The United Kingdom wishes to work with the international community to achieve a system for seabed mining which is generally acceptable and workable and to bring about generally agreed provisions for regulating marine matters. It is not too late to do this, although clearly it will not be easy. Some solutions may be found through rules adopted in the preparatory commission which has been established to implement the seabed aspects of the convention.

... I said that we are continuing to work for a solution which would enable deep sea mining to take place, but without the undesirable practical effects which the current suggestions allow. ... I do not think it would be appropriate for me to go into the details of this solution. However, it is perfectly clear that there is considerable opposition to the present solution. This gives me an opportunity to answer the point raised by the noble Lord, Lord Elwyn-Jones: the suggestion that some companies believe that the present situation is alright. I am able to confirm that the Government have sought the views of a number of bodies and organisations with interests in the various topics covered by the convention. Some of them have interests in more than one area. Parts of the convention are attractive to them, while other parts of the convention are unattractive to them. However we are not aware of any United Kingdom body with a deep seabed mining interest which does not consider that Part XI, as presently drafted, is unsatisfactory, and we are not aware of any such United Kingdom body which would wish to operate under the régime established by that part. We have received no request or advice to sign a convention in order that a United Kingdom company with a seabed mining interest might take advantage of the provisions enabling pioneer investors to be registered or otherwise to operate under the convention.

... Other solutions may well involve a change in what is currently envisaged in the convention, and it may be necessary to find new mechanisms for accomplishing that kind of change. It is our hope that other states will think it worth while continuing to seek solutions which establish a seabed régime that will attract those with the capacity to undertake seabed operations, and which will ensure that within that framework mineral resources are in fact put into circulation.

... With those aims in mind, a United Kingdom delegation attended the two meetings held last year in Kingston, Jamaica, of the Preparatory Commission. ... I should like to confirm that the Preparatory Commission is responsible for working out the technical and procedural provisions on deep seabed mining contained in the Law of the Sea Convention. It is our aim to achieve a realistic, practical and cost-effective régime and we feel that we can best start doing so in the Preparatory Commission.

(HL Debs., vol. 448, cols. 279-83: 15 February 1984)

**Part Nine: XIV. Seas, waterways—international regime of the sea in general**  
(See also Part Nine: XII., above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We are aware of the difficulty of obtaining the improvements to the deep seabed

mining regime which will be necessary before the United Kingdom can sign the convention. But even after the signature period has ended, the convention will remain open for accession.

(HC Debs., vol. 57, Written Answers, col. 424: 2 April 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote in part:

We have made it clear that we will not sign the convention until improvements are obtained to the mining regime. But, as a signatory to the final act of the law of the sea conference, the United Kingdom already plays an active role in the preparatory commission.

(Ibid., vol. 60, Written Answers, col. 612: 25 May 1984)

In reply to the question what is the view of Her Majesty's Government on the status in international law of the United Nations Convention on the Law of the Sea, the Minister of State, Foreign and Commonwealth Office, wrote:

The United Nations Law of the Sea Convention is an international treaty which will enter into force one year after there have been 60 ratifications or accessions. So far there have been 14 ratifications.

(HL Debs., vol. 457, col. 1301: 4 December 1984)

In the course of a debate in the House of Commons on the subject of the United Nations Law of the Sea Convention, the Minister of State, Foreign and Commonwealth Office, Mr Malcolm Rifkind, stated:

I can confirm that the Government's view has not changed from the one expressed in 1982 and that we have taken the decision that Britain should not sign the United Nations law of the sea convention.

Although 9 December is the last date on which signatures can be attached to the convention, it remains open for accession by states after that date. It would be open to the United Kingdom, or to other countries which have not signed, to become a party to the convention if in future it is improved in a way that we would find appropriate.

We have decided that, although we cannot sign the convention, we shall not object to the signature of the European Community being attached to it. The Community's competence is limited to fisheries, pollution, customs matters between landlocked states and commercial policy to a limited extent. There is nothing illogical in us not objecting to the Community's signature. The parts of the convention for which the Community is competent are parts to which we do not object. We should have been happy to sign the convention if it had dealt only with those issues.

I take exception to the idea that the United Kingdom is simply following United States policy without considering the British national interest. I urge my hon. Friends to reflect on that accusation, because it is unworthy. We have not followed the United States. We have insisted on participating in the preparatory commission and have shown our willingness in certain circumstances to accept the desirability of signing the convention, while the United States has taken a harsher position on most of the issues.

The suggestion that the countries which have refused to sign the convention are the lapdogs of the United States does not hold much water when one sees the list of countries which have refused to sign the convention. Over 30 countries, including those well-known followers of America such as Libya, Nicaragua and Albania, as well as many countries with varying political complexions, have refused to sign.

When about 14 years ago we entered the negotiations on this convention, the United Kingdom hoped for agreement on a comprehensive regime on marine matters which was generally acceptable to all nations. In the latter part of the conference it became clear that agreement could not be reached on the provisions related to deep sea-bed mining. Instead of being adopted by consensus, the text of the convention was put to a vote, in which the United Kingdom abstained.

Although much of the convention was recognised as valuable, the proposed regime for deep sea-bed mining was unacceptable to almost all the states which had the capacity to develop the industry. Although some countries involved in deep sea-bed mining might have signed the convention, all the western countries with an interest in the industry have made it clear that they do not intend to ratify the treaty unless substantial changes are made to it. Only ratification will introduce new rights or obligations.

We came to the position which I have described to the House on 2 December 1982. We were not prepared to sign the convention with the current mining regime.

My hon. Friend . . . asked what we have done in the last few years. We have tried to influence the improvement of the convention. We have faithfully followed that objective. We have participated to the extent that our being non-signatories made possible. We have put forward proposals and ideas and have fully participated in attempts to improve the convention. However, that has not produced the results for which we hoped.

We have a number of objections to the mining regime—the onerous financial and other terms governing the participation of commercial operators, the cost that would accrue to this Government of supporting the over-elaborate structure of the authority and the activities of its operating arm—the Enterprise.

I shall explain the costs. For example, the fixed administrative cost of ratification at 1983 prices, with the sea bed mining provisions unaltered and in force, would for the United Kingdom be between £3.6 million and £8 million. Running administrative costs would be between £1.5 million and £1.8 million.

In addition, the estimated cost to the United Kingdom of financing the Enterprise on the present basis would be between £25 million and £40 million in interest-free loans, plus the same amount in debt guarantees. That is on the assumption that the United States is also participating in the convention and paying its 33 per cent. share of the total cost. Since we know that the United States has no intention of participating, we have to add about 33 per cent. to those figures. Very large sums are therefore involved for a profoundly unattractive regime.

A further objection is the undesirable regulatory powers of the authority, in relation to production limitations, for example. In addition, there is the mandatory transfer of technology which sets an unacceptable precedent which cannot have attracted any of my hon. Friends.

Finally, it is proposed that there should be a review conference 15 years after

commercial mining commences. That review conference could force through an even more unattractive deep sea bed mining regime through the use of the majority vote by which countries that had no deep sea bed mining interest of their own could enforce their views on those that did and were paying for the whole operation.

Our delegation to the preparatory commission went to considerable lengths to put across our views and to open up possibilities for obtaining improvements, but only a few limited technical proposals met with any response. Accordingly, the balance of advantage had to be decided between the greater part of the convention which is acceptable, but much of which is codification of existing laws, and significant aspects which are unacceptable to us. Those parts of the convention which cause us difficulty raise such significant problems that it would not be in our interest to sign. Moreover, none of the benefits to us in the convention is certain or, indeed, will take effect until the convention comes into force. There may be 138 signatories to the convention, but only 14 countries have so far ratified, and the convention will enter into force only after 60 states have ratified or acceded. There is no legal status under the convention which has not yet entered into force.

Some people, including my hon. Friend the Member for Ynys Môn, have suggested that, by not signing, the United Kingdom loses the possibility for our companies to operate as pioneer investors under the convention's final Act. However, the terms are unattractive, and no United Kingdom entity interested in sea bed mining has indicated to us a wish to take advantage of those provisions.

(HC Debs., vol. 69, cols. 642-4: 6 December 1984)

**Part Ten: I. A. *Air space, outer space—sovereignty over air space—extent***  
(See also Part Ten: III., below)

In reply to a question, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Since 1967, when the Spanish Government established their prohibited air space, they have made representations on a number of occasions about flights by British aircraft. Part of the Spanish prohibited airspace is contiguous to Gibraltar airspace. We have consistently objected to the establishment of the prohibited airspace. We have urged the Spanish authorities to take early steps, in the interests of air safety, to adjust its application in such a way as not to impede the safe and effective use of Gibraltar airport. All aircraft landing and taking off at Gibraltar avoid, where possible, penetration of Spanish airspace subject always to the necessities of air safety.

(Ibid., vol. 63, Written Answers, col. 674: 13 July 1984)

**Part Ten: II. A. 2. *Air space, outer space—air navigation—civil aviation—treaty regime***

(See also Part Eight: II. D. (item of 9 December 1983), above)

Laker Airways Ltd. in liquidation (Laker) commenced civil actions in a United States court against various airlines including TWA. In these proceedings TWA was permitted to serve interrogatories on Laker which

was prohibited by Directions made under the Protection of Trading Interests Act 1980 from replying. Under this legislation the Secretary of State for Trade and Industry could give his consent to enable Laker to reply. In a letter dated 9 December 1983 addressed to Laker's London solicitors, Messrs Durrant Piesse, the Solicitor to the Department of Trade and Industry conveyed the Secretary of State's reasons for declining to grant such consent. The letter read in part:

Each of the Contracting Parties to the Bermuda 2 Air Services Agreement has an obligation under international law to ensure that its domestic law operates in a manner which is compatible with the Agreement and does not infringe or undermine the rights of the other Party. Her Majesty's Government considers that the use to which US domestic law is being put by the Department of Justice and by your clients is incompatible with the rights of the United Kingdom under the Agreement. H M Government have so informed the US Government. The US Government does not accept the position of H M Government and a dispute exists in respect of which there have been consultations. This dispute can only be resolved by negotiation between the two Governments or by arbitration under Bermuda 2. H M Government have fully reserved their rights and will arbitrate if necessary. It was against this background that the Secretary of State exercised his powers under the Protection of Trading Interests Act 1980, to avoid damage to the trading interests of the United Kingdom and to prohibit compliance with inadmissible requirements of US courts or authorities. In the Secretary of State's view to allow your clients to reply to the interrogatories would be inconsistent with the declared position of H M Government that the continuation and promotion of the anti-trust suit is itself inconsistent with and a derogation from the rights granted to the UK under Bermuda 2.

(Text provided by the Foreign and Commonwealth Office)

### **Part Ten: III. *Air space, outer space—outer space***

In a debate in the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space, established by the General Assembly of the United Nations, the United Kingdom representative, Mr A. Godson, stated on 4 April 1984:

I would now like to say something about the first part of this item, that is the definition and delimitation of outer space. Hitherto my delegation has held the view that there is no established scientific basis for drawing a boundary in order to define the lower limit of outer space, and that to attempt to establish such a boundary in law is premature. We have listened carefully to the discussion which has taken place here in the Sub Committee and in the working group on this aspect of item 5. But nothing we have heard so far has persuaded us that we should alter our basic position.

Some delegations have claimed that it is better to have a boundary somewhere, albeit an arbitrary one, than to have none at all. My delegation has still to be convinced that there is a practical need at present for a boundary. Moreover the proposal to set a boundary now on the grounds that something is better than nothing raises one basic question in our minds. It is this.

What would be the position if the artificial limit were established and then, perhaps because a real need and scientific basis could be identified, a number of delegations felt that the limit should be set at, say, a lower point above sea level? The obvious answer is that we simply renegotiate. But would it be as simple as that? Can we be sure that universal agreement could be obtained or would we simply be stuck with an artificial and unwelcome delimitation?

According to some delegations, our discussion is as much about sovereignty over air space as it is about defining a lower limit for outer space. This raises a further question, which to date has not been answered satisfactorily. If, as one delegation has suggested, the boundary was set at 110 kilometres, what practical difference would it make to the exercise of sovereign rights by the majority of states over their air space?

Nor have we had a clear indication from those states who are in favour of establishing a boundary for outer space as to how they think that their particular interests and activities in outer space would be affected.

The scepticism which a number of delegations, including my own share about the need to define a lower limit to outer space at this juncture has been described as negative. We are told that the Sub Committee should not confine itself to dealing with identifiable problems but that it should be forward-looking and anticipate future needs.

My delegation agrees wholeheartedly that preventive medicine is just as important as the search for cures. But, to continue the analogy for a moment, medical research is often a hit and miss process; not, I would have thought, a luxury that this Committee can afford. Moreover such research is a slow and careful process. Side-effects have to be studied thoroughly and overcome wherever possible before the product can be considered safe and useful.

To return to the specific case in point, a number of serious doubts and questions have been expressed about the implications or, if you like, the possible detrimental side effects of a premature and arbitrarily established delimitation of outer space. So far there have been no satisfactory answers forthcoming.

I should like to turn now, Mr Chairman, to the second part of agenda item 5, namely the character and utilisation of the geostationary orbit.

My delegation has taken opportunities in past sessions of this Sub Committee and the main Committee on the Peaceful Uses of Outer Space to set out our opinions on this subject. They can be summarised as follows:

We are firmly of the view that there can be no foundation to national claims of sovereignty to the G.S.O. since that orbit derives its attributes from the planet as a whole, and not directly from the territory over which it lies. In addition, claims to such sovereignty would, in our view, contravene the general principles enshrined in Articles I and II of the 1967 Outer Space Treaty. During our discussion of this agenda item, both in the plenary and in the working group, there have been a number of interesting statements to which my delegation has listened attentively. We were particularly pleased to hear assurances that consideration of the matter in this Committee would not infringe or impinge on the detailed and important work being carried out in this field by the International Telecommunications Union, the I.T.U. Some of these activities were described for us in the statement delivered by the representative of the I.T.U. on 27 March. As members of the Sub Committee will know, my delegation believes that the I.T.U. is the competent body to deal with matters relating to the G.S.O.

Some previous speakers have noted that the geostationary orbit is a limited resource. My delegation recognises that the scope for the number of satellites which can be operated in the G.S.O. without interfering with each other is finite. Accordingly, we think that it is imperative that all orbital positions should be taken up by international agreement as provided, for example, under the regulatory procedures of the I.T.U.

We therefore look forward to the results of the 1985 Administrative Radio Conference which will consider these and other problems on the basis of studies now being carried out. Quite clearly, the findings of the Conference will have an important bearing on any future discussions and for measures deemed appropriate regarding the efficient utilisation of the geostationary orbit.

(Text provided by the Foreign and Commonwealth Office)

**Part Ten: IV. *Air space, outer space—telecommunications including broadcasting***

(See also Part Ten: III., above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The Soviet authorities are already aware of our strong feelings about the continued jamming of BBC services in the Soviet Union, which contravenes the spirit and letter of the Helsinki final act as well as article 35 of the convention of the International Telecommunications Union of which the Soviet Union is a signatory. We shall take suitable opportunities to remind them of this and other failures to carry out their Madrid and Helsinki commitments.

(HC Debs., vol. 60, Written Answers, col. 115: 15 May 1984)

**Part Eleven: II. A. 1. *Responsibility—responsible entities—States—elements of responsibility***

In his opening statement on 24 April 1984 to the 25th (Extraordinary) Assembly of ICAO, the representative of the United Kingdom, Mr F. A. Neal, stated:

1. In the coming days we shall be looking at legal texts, and discussing legal concepts and principles. It will be all too easy for us to forget that the reason we are here is not to discuss abstract ideas; we are here because we want to ensure the safety of innocent men, women and children. When we speak of the use of force against civil aircraft, we are concerned not only about the shooting-down of machines; we are concerned to a much greater degree about the lives of the people on board them. In the words of the judgement of the International Court of Justice in the celebrated *Corfu Channel Case* we are concerned with 'elementary considerations of humanity'.

2. What I have just said may sound obvious, but sometimes the obvious has to be said. If it is not said, it may be forgotten. But if we keep in the forefront of our minds the fact that at this Assembly we are concerned—all of us—with the protection of human life, it may be easier for us all to see how best we can achieve that goal.

3. The UK is among those, Mr President, who do believe that the development of international law, particularly during this century, has made it clear beyond doubt that in time of peace, the use of force against civil aircraft is subject to very severe limitations. But equally, the tragic events of last year have demonstrated that it is desirable for States to reaffirm, by an express provision in the Chicago Convention, the legal rules concerning the use of force against civil aircraft. We are here to try to codify the relevant international law so that it is made clear by this Assembly to the World Community that no State is justified in using force against civil aircraft except in those wholly exceptional circumstances when it can be used in self defence—which I will mention later.

4. The position in international law is so important that I hope it will not be regarded as taking up unnecessarily the valuable time of the Assembly if I refer to it in some detail. The main sources of international law are listed in Article 38 of the Statute of the International Court of Justice. These can be summarised as:

- international conventions;
- customary international law, as evidenced by state practice;
- judicial decisions and the teachings of jurists; and
- general principles of law recognised by the international community.

5. There are two international conventions which are directly relevant: the Chicago Convention and the United Nations Charter. In so far as a State's military aircraft are concerned, Article 3(d) of the Convention places an obligation on the State when issuing regulations for such aircraft to have 'due regard for the safety of navigation of civil aircraft'. This is of course fully consistent with one of the basic objects and purposes of the Convention, which (as you said this morning Mr President) is the safety of international civil aviation. Indeed the Preamble refers to the 'safe' development of international civil aviation and this objective of safety is evident from even the most cursory study of its provisions. I need only refer to Article 12 (Rules of the Air), Article 25 (Aircraft in Distress), Article 26 (Investigation of Accidents), Article 28 (Air navigation Systems), Chapter V dealing with airworthiness and pilots' competence, and the international standards and recommended practices contained in the eighteen detailed Annexes. All of these provisions attest to the fact that safety is a fundamental purpose of the Convention. Indeed one need only refer to Articles 44(a), 44(d) and 44(h) to see that a fundamental purpose of this Organisation is the safety of international civil aviation. And this, as I said earlier, means primarily the safety of airline passengers and crews. The use of force against a civil aircraft amounts to a fundamental breach of the Convention on which international civil aviation is founded and runs wholly counter to the objectives of this Organisation.

6. In so far as the use of force against civil aircraft could be regarded as an exercise of force in international relations, it is also prohibited under the United Nations Charter. Article 2(4) of the Charter, which reflects the pre-existing rule of customary international law, prohibits States from the threat or use of force in any manner inconsistent with the Purposes of the United Nations. One of these Purposes is the promotion of human rights, one of the most important of which is the right to life.

7. In contrast to these Conventions, there is no Convention which authorises the use of force against civil aircraft in flight.

8. As regards the practice of States, since the Chicago Convention there have been a number of attacks on civil aircraft which have strayed into the airspace of another State. It is sufficient to refer briefly to three cases. In 1954, when a British airliner was shot down, the State responsible apologised and paid compensation. In 1955, when an El Al airliner was shot down, the State responsible acknowledged, at least initially, the wrongfulness of its action. The shooting down of a Libyan airliner in 1973 was strongly condemned by more than 100 States in the ICAO Assembly. In other cases where a State did not admit liability, the States in which the aircraft were registered and whose nationals were on board protested the illegality of the action.

9. The several arbitral decisions concerning transfrontier incidents, such as those made by the US/Mexico Claims Commission in the 1920s, and in the case of the vessel the 'I'm Alone' which involved actions by the United States Coast-guard, demonstrate most clearly that it is wrongful under international law to kill foreign nationals even if they deliberately trespass into your territory or violate your law. The only significant difference between these cases and intrusion by civil aircraft is that the numbers of human lives at risk if force is used against a civil aircraft like a wide-bodied jet are likely to run into hundreds.

10. In the *Corfu Channel Case*, although it was not concerned with an intrusion into the territory of another State, the International Court of Justice condemned action by States which in time of peace unnecessarily or recklessly involves risk to the lives of nationals of other States.

11. In national laws the undue respect and protection given to property rights, which was a feature of many legal systems in the nineteenth century, has long given way to a proper recognition that sanctity of life is more important than the protection of property; and that you cannot kill a trespasser unless he poses an imminent threat to your life. And even then, the amount of force you are entitled to use must be reasonable and not out of proportion. Since the use of any force against a civil aircraft is likely to endanger it, and therefore its occupants, such use of force cannot be regarded as reasonable.

12. The position in international law has been most recently recognised in the resolution of the Council of 6 March 1984 which reaffirmed that the use of armed force against civil aircraft is a violation of international law.

13. Thus, after examining all sources of international law, it is clear that the use of force against a civil aircraft in flight in time of peace is prohibited. The only exception to this rule is when force can be justified as a legitimate exercise of a State's inherent right of self-defence.

Mr Neal then discussed the issue of self-defence (See Part Fourteen: III., below) and afterwards concluded:

16. But if the aircraft merely enters the State's airspace without permission, whether by mistake or deliberately, there can be no justification for using force against it, even if it is being used for activities inconsistent with its status as a civil aircraft. Provided it is not endangering the lives of persons not on board, the use of force against it cannot be regarded as permissible. However reprehensible it may be to use civil aircraft to gather intelligence, international law requires that the right of a State to protect itself against such activities must be balanced against (as the International Court said) 'elementary considerations of humanity'. There are some who assert that endangering the lives of hundreds of civilian passengers is

justifiable because the sovereignty of a State has been infringed. They have a most difficult (and we would say impossible) task to justify that assertion, not only morally, but legally.

17. Unfortunately, some States have attempted to claim just such a right. Therefore, despite the weighty corpus of law which says that they are wrong, the United Kingdom will support to the full in this Assembly any proposal to amend the Convention which reaffirms in formal and specific terms the existing position in international law in relation to the particular circumstances of international civil aviation.

(Text provided by the Foreign and Commonwealth Office)

**Part Eleven: II. A. 2. Responsibility—responsible entities—States—executive acts**

The Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, made the following statement in the House of Commons:

We learnt on 7 March that a British-registered ship, *The Charming*, which formed part of a convoy under Iranian protection, was hit in an Iraqi attack in the northern Gulf on 1 March. The attack took place within Iranian territorial waters in the approaches to Bandar Khomeini.

The ship, which was carrying a cargo of alumina ore, is reported to be substantially damaged and aground outside Bandar Khomeini. I am glad to say that none of the crew was seriously hurt and I understand that most of them have now left Iran. It has been reported that Turkish and Indian ships forming part of the same convoy were also hit.

The *Charming*, like other ships in the convoy, had been and was required to maintain radio silence. Her owners did not subsequently inform Her Majesty's Government about the attack on their ship, and have requested no assistance.

(HC Debs., vol. 55, col. 994: 8 March 1984; see also HL Debs, vol. 449, cols. 382-3: 8 March 1984)

In a later statement in the House of Commons, the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, stated of a similar incident:

At approximately 1200 hours GMT, a British-owned and registered tanker, the *British Renown*, was attacked from the air and struck by two missiles, which I am glad to report caused little damage and no casualties among the crew, nearly all of whom were British subjects. The *British Renown* is now anchored nine miles off Dubai, and a member of the staff of our consulate general has gone on board to render any assistance that may be needed.

All the available evidence is that the attack was made by aircraft of the Iranian air force. Accordingly, in the absence in Tehran of the Iranian chargé d'affaires, we have summoned the next most senior member of the Iranian embassy in order to deliver a strong protest. Her Majesty's Government have made it clear that this deliberate, unprovoked and wholly unjustified attack is totally unacceptable.

(HC Debs., vol. 63, col. 1044: 11 July 1984)

On 17 April 1984, Woman Police Constable Yvonne Fletcher, while on duty, was shot dead by bullets believed to have been fired from Libyan diplomatic premises in St James's Square, London. On 22 April 1982, the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, issued a Press Statement in which he stated:

The murder of WPC Fletcher on 17 April from inside the Libyan People's Bureau was outrageous. It was a totally unacceptable and unprecedented breach of British law, international law and the Vienna Convention on diplomatic relations.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question:

... what diplomatic advice was given by his Department to Iran in the summer of 1983 regarding the contents of political banners hung outside the Iranian embassy on the day described as Al-Quds day; whether he has received any request for any politically controversial material in the current year; and what response he has made,

the Minister of State, Foreign and Commonwealth Office, wrote:

The Iranian chargé d'affaires was called to the Foreign and Commonwealth Office and told that the displaying of such banners would require planning permission from Westminster city council. Without this permission the display would be in contravention of article 41 of the Vienna convention. We have received no requests for the displaying of banners this year.

(HC Debs., vol. 60, Written Answers, col. 608: 25 May 1984; see also *ibid.*, vol. 63, Written Answers, col. 408: 9 July 1984)

On 9 October 1984, the Iraqi Ambassador was summoned to the Foreign and Commonwealth Office to receive a formal complaint over an attack on a Liberian-registered, Hong Kong-owned tanker, *The World Knight*, south of Kharg Island, which killed two British officers. In a Press Statement, the Foreign and Commonwealth Office stated that it was 'deeply concerned that once again an incident in the Gulf has resulted in the death of British nationals'.

(Information provided by the Foreign and Commonwealth Office)

**Part Eleven: II. A. 6. Responsibility—responsible entities—States—reparation**

On 7 October 1983, the Government of the United Kingdom and the Government of the Republic of Panama signed an Agreement for the Promotion and Protection of Investments. Articles 4 and 5 of the Agreement read as follows:

ARTICLE 4

**Compensation for Losses**

Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed

conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State, and in the exceptional event of losses suffered resulting from requisitioning or from destruction of property which was not caused in combat action or was not required by the necessity of the situation, the investor shall be accorded restitution or adequate compensation in accordance with the relevant laws. Resulting payments shall be freely transferable.

#### ARTICLE 5

#### **Expropriation**

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') in the territory of the other Contracting Party except for an internal public or social purpose against prompt, adequate and effective compensation, and in conformity with the internal law. Such compensation shall amount to the fair value which the investment expropriated had immediately before the expropriation became known, shall include interest until the date of payment, shall be made without delay, be effectively realisable and be freely transferable. No later than the time of the expropriation, adequate provision shall be made for the assessment and payment of the compensation. The legality of the expropriation and the amount of compensation shall be established by due process of law in the territory of the Contracting Party making the expropriation.

(2) If either Contracting Party expropriates the investment of any company duly incorporated, constituted or otherwise organised in its territory, and if nationals or companies of the other Contracting Party, directly or indirectly, own, hold or have other rights with respect to the equity of such company, then the Contracting Party within whose territory the expropriation occurs shall ensure that nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

(Cmnd. 9144)

After making a statement on the subject of an Iraqi attack on a British-registered ship in the Gulf (see Part Eleven: II. A. 2., above), the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, in response to the question whether the British Government was intending to ask Iraq for compensation, stated:

That is a matter for the parties concerned, although obviously, after we have investigated and have received an explanation that we demanded from the Iraqi Government this morning, we have to reserve the right to compensation in due course.

(HC Debs., vol. 55, col. 999: 8 March 1984; see also HL Debs., vol. 449, col. 384: 8 March 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The International Court of Justice awarded damages of £843,947 to the United Kingdom in 1949 against the Albanians in respect of their responsibility for the loss of two British naval vessels in the Corfu Channel in 1946. The terms of reference of the Tripartite Gold Commission require all decisions to be taken by the unanimous agreement of the three Governments. The matter cannot therefore be settled unilaterally by us.

(HC Debs., vol. 60, Written Answers, col. 233: 17 May 1984)

**Part Eleven: II. A. 7. (a). (i).** *Responsibility—responsible entities—States—procedure—diplomatic protection—nationality of claims*

On 7 October 1983, the Governments of the United Kingdom and the Republic of Panama signed an Agreement for the Promotion and Protection of Investments. Article 1 of the Agreement read in part as follows:

For the purpose of this Agreement—

...

(c)

‘nationals’ means:

- (i) in respect of the Republic of Panama: natural persons deriving their status as nationals of the Republic of Panama from the constitution of Panama;
- (ii) in respect of the United Kingdom: natural persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom.

(d) ‘companies’ means:

- (i) in respect of the Republic of Panama: all those juridical persons constituted in accordance with legislation in force in Panama as well as companies and associations with or without juridical personality which have their domicile in the territory of the Republic of Panama, excepting State-owned enterprises;
- (ii) in respect of the United Kingdom: corporations, firms or associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 10;

(Cmnd. 9144)

In reply to a question on the subject of Zimbabwean air force officers earlier imprisoned and acquitted in Zimbabwe, the Minister of State, Foreign and Commonwealth Office, wrote:

The officers are all Zimbabwean citizens and their claim is against the Zimbabwe Government. They are pursuing it through their legal advisers. We have no formal standing in the matter even though some of the men concurrently hold British citizenship. Nevertheless we are in touch with the officers and we have raised the matter informally with the Zimbabwean authorities on several occasions. We shall continue to do what we properly can to be helpful.

(HC Debs., vol. 61, Written Answers, col. 55: 4 June 1984)

**Part Eleven: II. A. 7. (a). (ii).** *Responsibility—responsible entities—States—procedure—diplomatic and consular protection—exhaustion of local remedies*

In a letter dated 25 April 1983, the Secretary of State for Foreign and Commonwealth Affairs wrote to claimants against the Ugandan Government in respect of compensation for expropriated assets in Uganda. The letter, after advising the claimants to lodge their claims with the Ugandan Government, went on:

You may wonder . . . why the British Government cannot make the claim on your behalf. The answer is that under generally accepted rules of international law a State is entitled to insist that a claimant against it must first exhaust the local remedies which the State has made available to him before any claim he may have can be taken up by his Government. We are therefore bound to require a claimant against another State to pursue his claim himself through the local procedures that are available. Only if it becomes clear that these remedies are not effective, will it be open for HMG to seek to intervene on his behalf.

(Text of letter reproduced in the judgment of Woolf J in *R v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Pirbhai and others*: Queen's Bench Division, 7 September 1984)

**Part Eleven: II. D. 2.** *Responsibility—responsible entities—individuals including corporations—responsibility of individuals*

On 25 October 1983 at the 53rd Meeting of the Sixth Committee of the General Assembly of the United Nations, on the subject of a Draft Code of Offences against the Peace and Security of Mankind, the United Kingdom representative, Mr F. D. Berman, stated that

. . . the re-emergence of the item on the draft Code of Offences against the Peace and Security of Mankind bore testimony to the fact that, just as in 1919 or 1946, there was still deep concern that perpetrators of heinous acts of terrorism and violence should be brought to justice. The United Kingdom shared that concern but, as stated in the past, had reservations concerning the need for, and efficacy of, a draft code of offences in the form proposed.

14. On the question of need, he recalled that the United Kingdom, in its written comments reproduced in document A/35/210/Add. 1, had asked whether the need for a code of offences against the peace and security of mankind had been obviated by other instruments already adopted. It had made particular reference to the Convention on the Prevention and Punishment of the Crime of Genocide and the two Additional Protocols revising and supplementing the 1949 Geneva Conventions for the protection of war victims. Other States had expressed similar reservations.

15. On the question of efficacy, he noted from paragraph 54 of the Commission's report (A/38/10) that emphasis had been placed on the preventive and deterrent role of the Code. However, the deterrent role of a code should not be overemphasized. The persons who committed the worst atrocities in the contemporary world were often so calculating and determined that they would not be deterred by an international code.

16. Notwithstanding those reservations, his delegation believed that the debate in the Commission at its thirty-fifth session had been useful and had served to focus attention on certain issues where the Commission needed further guidance from the Sixth Committee.

17. Regarding the substance of the debate, his delegation would in general accept the Commission's conclusion that the content of the Code should be confined to the most serious crimes under international law. As for its content *ratione personae*, he noted that there was acute division in the Commission on the question whether the Code should impute international criminal responsibility to States as well as individuals. His delegation had no doubt that the code should apply only to individuals. There was a whole range of measures, of a coercive or semi-coercive nature, which could be taken by the Security Council and which, although not penal as such, could be used to restrain or penalize a guilty State. States which did not respond to the Charter would be unlikely to respond to a code of offences. He disagreed with the view that article 19 of the draft on State responsibility had already established the international criminal responsibility of States. His Government had expressed strong and continuing reservations about the distinction which article 19 seemed to establish between international delicts and so-called international crimes within the framework of the codification of the law of State responsibility. In any case, the Commission had been careful to point out, in formulating article 19, that its contents had nothing to do with the international criminal responsibility of individuals, much less of States.

18. He noted from paragraph 69 (c) of the report that the Commission was seeking guidance from the Sixth Committee as to whether its mandate should be interpreted as extending to the preparation of a statute of an international criminal court. His delegation had spoken in the past of all the difficulties attaching to such a proposal. It was nevertheless clear that the implementation of a code of offences could not be left to national courts. That would be highly imprudent and dangerous. No matter how objective the national court might be in seeking to apply the code, it would inevitably be argued that justice had not been done or had not been seen to be done. The only feasible alternative would be an international criminal court. An international penal code which could not be enforced impartially and objectively would be worthless. Logic therefore dictated that, if the international community was seeking to elaborate a code of offences, it must at the same time ensure that such a code was capable of impartial and objective application and enforcement. He therefore believed that the Commission's mandate should be regarded as extending to the preparation of a statute of an international criminal jurisdiction, competent to hear cases brought against individuals. There were major problems associated with the establishment of an international criminal jurisdiction, but at least the Commission could profitably be called upon to advise on the technical aspects of the matter. It was a difficult and controversial subject which had been described as one of great contemporary relevance. The Commission should be left to deal with it in accordance with its established working methods and with its accustomed thoroughness and completeness, free from undue pressures.

(A/C. 6/38/SR. 53, pp. 4-5)

In the course of a statement on 13 November 1984 in the Sixth Committee on the same topic as discussed in the International Law

Commission's report on its 1984 session, the United Kingdom representative, Sir John Freeland, remarked:

I will deal first with the draft Code of Offences against the Peace and Security of Mankind. I do so because Chapter II, the relevant part of the Commission's Report, gives rise to considerable disquiet on the part of my authorities. We of course noted, and we noted with satisfaction, the agreement recorded in paragraph 32 to the effect that the Commission's efforts should be devoted exclusively to the criminal responsibility of *individuals*. That satisfaction remains, even though the Commission rather over-cautiously, in our view, qualified its conclusion as a conclusion which holds only at the present stage of its work. I shall mention later certain consequences which flow from this decision to limit the content of the draft *ratione personae*.

However, Mr Chairman, my delegation's major reservations relate rather to the remainder of the Commission's report on the topic, dealing with the content of the draft *ratione materiae*. The Commission's apparent conclusions on this aspect bear out only too strongly the warnings of dangers ahead which were contained in our statement last year in explanation of vote on Resolution 38/132.

First and foremost is the question of methodology. My delegation pointed out last year that we could find nothing in the 1983 Report which recorded any decision by the Commission to draw up a so-called 'list of offences' at the initial stage of its work. Whatever one's view may be on that point (and it is that point which seems to represent the assumption underlying the last phrase in operative paragraph 1 of Resolution 38/132), we cannot believe that the Commission was right simply to set aside the General Assembly's invitation in that Resolution to elaborate an introduction, and instead to devote itself exclusively to the preparation of a list of offences. At issue here is the whole question of what, in reality, *constitutes* that which we refer to as an 'offence against the peace and security of mankind'. This is an essential question, which cannot be begged if the work of the Commission is to go forward with any prospect of useful results. At some stage it will have to be answered. The Commission would surely have been better advised to establish, even if only on a tentative and provisional basis, certain criteria to be used for the purpose of testing the various items which had been or might be suggested for inclusion in the list foreseen in the General Assembly Resolution. No doubt such criteria, as I have said, might be both tentative and provisional: the criteria might be refined by the process of being tested against actual cases of proposed 'offences', in the same way as proposed 'offences' might be tested against the criteria. In short, it is possible to envisage the elaboration of general criteria and of particular offences as proceeding in step, if not actually hand-in-hand. Surely this is what the General Assembly was indicating, however imperfectly, when paragraph 1 of Resolution 38/132 invited the Commission to elaborate, as a first step, both an introduction and a list of offences.

My delegation has of course studied the account given in paragraphs 34 to 39 of the debate in the Commission and the reasons given why the Commission 'could not already enunciate general rules at the present stage'. These paragraphs fail, however, to provide an entirely adequate account of why the Commission appears on all the evidence to have deviated from its decision at its preceding session to combine the deductive method closely with the inductive method. The 1954 draft Code, notwithstanding criticisms that have been voiced of it in the past, at least

contained elements towards a general definition in its Articles 1, 3 and 4. According to those provisions, an offence against the peace and security of mankind exhibits at least the following minimum characteristics: it is a crime under international law; it is a crime for which the responsible individuals 'shall be punished'; it is a crime in respect of which there is no absolution by reason of the fact that the responsible individual acted as head of State or responsible government official; and, finally, it is a crime in respect of which the defence of superior orders is not available so long as the responsible individual retained in the circumstances the possibility of non-compliance with such orders.

Would it not have been possible for the Commission to have started with these elements derived from its previous work, as the first step towards the selection of criteria for eventual agreement on a list of offences? Without some such approach, what the Commission has this year called 'the study of the living tissue' can degenerate all too easily into an exercise not only *in abstracto* but also *in vacuo*, and the subsequent preparation of an introduction can become mere self-validation. To proceed as the Commission has done so far is in fact to substitute for the combined inductive/deductive approach an implicit criterion consisting either in the appearance of an act on the 1954 list or alternatively its mention in a varied catalogue of recent, or comparatively recent, international documents. I interpolate here that the documents listed in paragraph 50 of the Report are a varied catalogue with widely differing legal status, as has already been pointed out in this debate. More than that, although these documents are said to be those 'which regard certain acts as international crimes', in fact many of them contain no mention of criminal acts at all, let alone international crimes. An approach towards the listing of offences which fails to validate the listing by means of carefully worked out criteria based upon established international law is likely only to result in a concept of 'offence against the peace and security of mankind' as a further pejorative slogan against forms of more or less highly disagreeable international conduct, but with little specifically legal content.

My delegation therefore urges the Commission to take a fresh look at its approach on this topic. The Commission should, we suggest, use as its starting point its decision, which I have already mentioned, to devote its efforts exclusively to the criminal responsibility of individuals. This would entail a number of consequences. One is that the Commission would have to consider as it proceeds the feasibility and the detailed incidents of an international criminal jurisdiction, since without this the criminal responsibility of individuals would not be a reality. My delegation has drawn attention to this aspect in earlier years.

A second consequence of the decision to focus on the criminal responsibility of individuals must necessarily be the need for precise analysis leading to precise definition. I have already listed, by reference to the 1954 draft, some of the presumed consequences of stigmatising conduct as an offence against the peace and security of mankind. Given these presumed consequences it would clearly be unacceptable for the Commission to remain at the level of broad conceptual generalities. Without precise definition of what actual conduct on the part of individuals is to be criminalised, the notion of pursuit and punishment becomes meaningless. The need for this kind of precision becomes particularly evident in the light of some of the extremely broad concepts mentioned in paragraphs 52 onwards of this part of the Commission's Report: concepts such as 'colonialism', 'serious damage to the environment', 'economic aggression' are unacceptably

vague and ambiguous when it comes to the issue of proscribing by a system of universal criminal penalties the particular conduct of individuals.

A precondition for this precision is that the Commission must strive for the utmost clarity in its own analysis. At the present stage, there is, we find, a rather disturbing tendency to wander at will between the expressions 'offence against the peace and security of mankind', 'crime against humanity', 'international crime' and so forth, as if these expressions were all broadly synonymous, even though the Commission itself recognises that not every international crime is necessarily an offence against the peace and security of mankind. For reasons which are not dissimilar, my delegation views with considerable reserve the technique of proceeding by way of an ostensible choice between, in the Commission's terminology, a minimum content and a maximum content. By concealing the need for clear analysis and definition in each particular case, such a technique may imply that general agreement already exists on what has been listed in the Commission's Report under the rubric 'minimum content'. In fact, however, (and leaving aside for the moment the problems of definition to which I have referred and which the Commission itself mentions from time to time in its Report) it is questionable, to say the least, whether some of the items so listed have a sufficient connexion with criminal conduct under international law as it should be understood for the purposes of the present topic. A clear example is presented by the rather loose references in paragraphs 54 to 57 of the Report to atomic weapons and prohibitions on their use. As the Commission points out, there exists no treaty forbidding use of atomic weapons. It is therefore understandable that, as indicated in the last sentence of paragraph 57 of the Report, the Commission might require more specific guidance before it was able to reach a conclusion whether this problem should properly be dealt with in the draft Code or not. But, if so, it is surely strange that the subject should still be listed as part of the 'minimum content' for the draft Code. I would add that, in the view of my delegation, for the Commission to countenance the proposition that the use, or even the first use, of atomic weapons is *per se* illegal would be both unjustified, as a matter of law, and unwise.

An observation of a slightly different character applies to the reference in paragraph 59 of the Report to 'mercenarism'. The term itself is a controversial and perhaps questionable one, but there is at all events an obvious danger that the Commission's decision under this head might both prejudice and presuppose the outcome of the negotiations at present being undertaken in the Ad Hoc Committee on the Drafting of a Convention Against the Recruitment, Use, Financing and Training of Mercenaries.

(Text provided by the Foreign and Commonwealth Office)

## **Part Twelve: II. A. *Pacific settlement of disputes—modes of settlement—negotiation***

In the course of a debate in the Security Council on 3 August 1984 on the subject of the Falkland Islands, the United Kingdom representative, Mr J. W. D. Margetson, referred to a previous statement by Argentina and stated:

It is a misstatement of the Charter to suggest that the obligation to seek

solutions by peaceful means requires that, irrespective of the circumstances, recourse must be had, solely or even primarily, to negotiation.

(A/39/373, p. 2)

**Part Twelve: II. D. *Pacific settlement of disputes—modes of settlement—good offices***

(See also Part Eight: II. A. (item of 11 May 1984), above)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We have repeatedly urged both Iran and Iraq to accept mediation, particularly the good offices of the United Nations Secretary-General. We support any realistic attempt to bring an end to this tragic conflict. Regrettably, there is no harmony of view between Iran and Iraq on how further mediation could help bring this about.

(HC Debs., vol. 56, Written Answers, cols. 457–8: 21 March 1984)

**Part Twelve: II. E. *Pacific settlement of disputes—modes of settlement—mediation***

(See Part Twelve: II. D., above)

**Part Twelve: II. G. 1. *Pacific settlement of disputes—modes of settlement—arbitration—arbitral tribunals and commissions***

On 7 October 1983, the Governments of the United Kingdom and the Republic of Panama signed an Agreement for the Promotion and Protection of Investments. Articles 7 and 8 of the Agreement read as follows:

ARTICLE 7

**Settlement of Investment Disputes**

Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been settled amicably, shall after a period of six months from written notification of the claim be submitted to such procedures for settlement as may be agreed to between the parties to the dispute or, if no such procedures have been agreed, to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law. The parties may agree in writing to modify those Rules.

ARTICLE 8

**Disputes between the Contracting Parties**

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled in the first instance through discussion between experts representing each Party, and failing that, through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. These two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the period specified in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party or if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said functions, the member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and its representation in the arbitral proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

(Cmnd. 9144)

**Part Twelve: II. H. 1. *Pacific settlement of disputes—modes of settlement—judicial settlement—the International Court of Justice***

In reply to the question whether Her Majesty's Government will now refer the dispute with Argentina over sovereignty to the Falkland Islands to the International Court of Justice, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Argentina has shown no interest in referring the issue of sovereignty over the Falkland Islands to the International Court of Justice and we have never proposed it. That remains the position.

(HC Debs., vol. 54, Written Answers, col. 558: 22 February 1984)

In reply to a question on the subject of the Falkland Islands dispute, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

A reference to the International Court of Justice by one party would not require the prior agreement of the other; but the court would not be able to act on the reference unless it was established that both parties were willing to consent to the exercise of the court's jurisdiction.

(Ibid., vol. 55, Written Answers, col. 412: 5 March 1984)

In reply to the question whether Her Majesty's Government would take steps to clarify the jurisdiction of the Court in view of the United States' decision not to accept its jurisdiction in the dispute with Nicaragua, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

Under article 36 of the Statute of the International Court of Justice it is for the court itself to decide on whether it has jurisdiction in any case submitted to it. (HC Debs., vol. 58, Written Answers, col. 469: 13 April 1984; see also *ibid.*, col. 502: 25 April 1984)

**Part Twelve: II. H. 2.** *Pacific settlement of disputes—modes of settlement—judicial settlement—tribunals other than the International Court of Justice*

In the course of an address to the British Institute of International and Comparative Law given on 17 January 1984, the Secretary of State for Foreign and Commonwealth Affairs, Sir Geoffrey Howe, said:

Even if Community institutions have fallen short in the pursuit of the objectives of the Treaties, I would not wish to leave the subject of the Community without paying tribute to the work done by the European Court of Justice in Luxembourg. That Court plays a unique, and active, role in interpreting Community law. I was closely involved with the passing of the European Communities Act 1972, the mechanism by which directly applicable Community law takes effect as law in this country. As I pointed out in a lecture which I gave at Chatham House in 1972, section 2 of that Act identifies the character of directly applicable Community law as a separate and new legal order, to be applied by our courts alongside our domestic law. It thus divides it off from the general body of (indirectly applicable) international law. The Luxembourg Court is concerned essentially with that separate order of Community law. And by virtue of the 1972 Act Community law has, to adapt some well remembered words of Lord Denning in the *Bulmer v Bollinger* case in 1974, flowed into the estuaries and up the rivers of this country. The full and confident cooperation with national courts which the Luxembourg Court has established through use of the Article 177 reference procedure is among its greatest achievements. No-one can say that this Court is under-employed.

(Text provided by the Foreign and Commonwealth Office)

**Part Thirteen: I. D.** *Coercion and use of force short of war—unilateral acts—intervention*

(See also Part Eleven: II. A. 1., above)

In a speech to the Security Council during a debate on a complaint by Angola against South Africa, the United Kingdom representative, Mr J. Margetson, stated on 6 January 1984:

We join members of the Council in condemning South African military action in Angola, which is a flagrant violation of international law and the independence, sovereignty and territorial integrity of Angola.

(S/PV. 2511, p. 27)

In the course of a debate in the House of Lords on the subject of sovereignty in international law, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated in response to a question:

He asked what were the circumstances in which the Government recognise any right of armed intervention? The answer, which answers the question he has just posed, is that any armed intervention could not be regarded as lawful unless the state in which the intervention took place gave a genuine invitation to the intervening state or the intervention could be justified in accordance with the principle of self-defence, confirmed by Article 51 of the United Nations Charter.

(HL Debs., vol. 448, col. 344: 15 February 1984)

The Foreign and Commonwealth Office provided the Foreign Affairs Committee of the House of Commons with a memorandum, dated 17 February 1984, on the part played by Montserrat in the Grenada intervention, and on the instructions given to the Montserrat Government by Her Majesty's Government. The memorandum, after referring to the statement in the House of Lords of 1 November 1983 [see UKMIL 1983, p. 529], concluded:

The Executive Council of Montserrat asked on 25 October 1983, after the start of the intervention in Grenada, for HMG's approval to send a small contingent of volunteers from the Montserrat Defence Force to Grenada. The Foreign and Commonwealth Secretary was unable to approve this request because it was not in accord with HMG's policy at that time, because the status of members of the force operating outside Montserrat would have been very questionable in both local and international law, and because the force is neither properly trained [n]or equipped for such operations.

(*Parliamentary Papers*, 1983-4, HC, Paper 226, p. 41)

In a memorandum dated 27 March 1984 submitted to the Foreign Affairs Committee of the House of Commons, the Foreign and Commonwealth Office, having referred to the negotiations between Britain and Argentina in April-June 1982, wrote:

The Government's approach in all the negotiations was based on important principles, which Ministers had set out repeatedly in Parliament:—

- (a) *International Law*. Argentina's unlawful aggression had to end and Security Council Resolution 502 had to be implemented. Aggression must not be rewarded, or small countries across the world would feel threatened by neighbours with territorial ambitions.

(*Ibid.*, Paper 268-viii, p. 121)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

We deplore the recent incursions into Thai territory by Vietnamese troops from Cambodia and the resulting loss of life and disruption to refugee communities on

the Thai-Cambodian border. We continue to believe that there should be an early withdrawal of all Vietnamese forces from Cambodia.

(HC Debs., vol. 58, Written Answers, col. 500: 25 April 1984)

**Part Thirteen: I. E. Coercion and use of force short of war—other unilateral acts, including self-defence**

(See also Part Fourteen: III., below)

In the course of a debate in the House of Lords on the subject of diplomatic immunity and terrorist attacks, in particular the shooting incident at the Libyan Mission in London, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated the 'basic rules of inviolability' and cautioned against entering into 'the dangerous game of claiming rights of retaliation in response to a breach of the [Vienna] convention'. She went on:

But this certainly does not mean that the fundamental right of self-defence, either in international law or in domestic law, is irrelevant in this context. Your Lordships may indeed recall that we relied on it when we made clear that those emerging from the Libyan People's Bureau, diplomats and non-diplomats alike, were personally searched for weapons and explosives before their identities were established. This limitation on the inviolability of the diplomats concerned was clearly essential for the protection of the police handling this stage of the expulsion, and its justification on grounds of self-defence has not been seriously challenged.

(HL Debs., vol. 451, col. 1474: 16 May 1984)

The Foreign and Commonwealth Office submitted a memorandum, dated 6 June 1984, on the subject of diplomatic immunities and privileges to the Foreign Affairs Committee of the House of Commons which was investigating this subject in the wake of the shooting incident at the Libyan mission in London on 17 April 1984. In reply to the question 'does HMG believe that the Convention [on Diplomatic Relations] provides sufficient scope for the receiving country to vary the operation of particular provisions in cases where serious abuses of the Convention are known to have occurred', the memorandum stated in part:

It should also be recalled that the rules of the Convention do not prejudice the fundamental right of self-defence either in international law or in domestic law. Self-defence was relied on by the Government in conducting a search of all those emerging from the Libyan People's Bureau, who were personally searched for weapons and explosives before it was established whether or not they were diplomats. This was considered essential for the protection of police officers handling this stage of the expulsion.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, p. 9, paragraph 45; for the full text of the reply see Part Six: IV. E., above)

On 20 June 1984, the Foreign Affairs Committee took evidence from senior officials of the Foreign and Commonwealth Office, *inter alios*, Sir

Antony Acland, Permanent Under-Secretary of State and Head of the Diplomatic Service, Sir John Freeland, Legal Adviser, and Mr Eustace Gibbs, Assistant Under-Secretary of State, Vice Marshal of the Diplomatic Corps and Head of Protocol Department. The following is an extract from the proceedings:

[Q. 47.] . . . May I ask you about a reference which you make in paragraph 45 of your memorandum to self-defence. I am on the subject of inviolability of the premises. The question of self-defence in international law was also referred to by Lord Denning in a recent speech in the House of Lords. There is a number of questions I would like to ask you about that. Firstly, self-defence in international law is generally held to refer only to the self-defence of states against other states rather than individuals; is that right?

(*Sir John Freeland.*) I would not accept that. I think self-defence applies not only to action taken directly against a state but also to action directed against nationals of that state.

[Q. 48.] So that when you say that it was in pursuit of our rights in self-defence that we searched the diplomats leaving, that was not just self-defence in domestic law but also your interpretation of self-defence in international law?

(*Sir John Freeland.*) Yes.

[Q. 49.] If we had a right in self-defence in international law or domestic law to protect ourselves against attack, what was to stop the police going into the embassy building immediately they heard firing to seize the guns, the ammunition or the firer in self-defence?

(*Sir John Freeland.*) Perhaps I might reply initially rather generally. It is, of course, the case that the doctrine of self-defence in international law is a very restrictive one. The classic formulation, which I have got in front of me, is that self-defence is justified where there is 'a necessity of self-defence instant, overwhelming, leaving no choice of means and no moment for deliberation'. In more modern parlance, we would take the view that the right to resort to self-defence arises where there is a serious threat or actual danger, where there is no other means of averting it or bringing it to an end, and that the action taken in self-defence must be limited to what is necessary and what is proportionate. So there are really quite a lot of qualifications with which this right is hedged around.

[Q. 50.] Yes, but do those qualifications actually apply to a situation when someone starts firing as a result of which someone is killed through the window of an embassy and the public wants to know, and not just the lawyers, whether we had a right to go in immediately in self-defence and seize persons and articles?

(*Sir John Freeland.*) I certainly would not exclude the possibility of its being justifiable in a case where, for example, there is continued firing of weapons from the premises of an embassy, where every other method has been tried and has failed to stop that, for it then to be lawful to go into the embassy to stop it, but that is not exactly the situation which you were describing. The one I was describing is one where there is a continuing danger or threat.

[Q. 51.] Had the decision been taken by someone, and the channel of decision taken is a relevant factor, to go in within seconds of fire being opened from the window in the embassy, and the person or objects seized, what in international law could the Libyan Government have done about it?

(*Sir John Freeland.*) When you say 'in international law what could they have done about it', they could, of course, have complained, and no doubt would have complained if what happened was something which they regarded as a breach of international law. They could not have taken us before an international tribunal. But perhaps I could add this: you put the question to me exclusively in terms of international law. As an international lawyer I should not mind that. I must say, though, that particularly in the field of international law it seems to me that one risks producing a rather misleading result if one looks at a situation exclusively in terms of the law because in the situation you put to me, including the question of what the Libyans would have done, it would have been necessary for anybody who was thinking of ordering the police into the mission to have regard, not just to what the Libyans could do to us in terms of international law, but what they could do to us in practical terms. Of course, it was the Libyan case, publicly announced, promulgated in letters to the United Nations, that nothing wrong had been done by their embassy.

[Q. 52.] Afterwards?

(*Sir John Freeland.*) Yes; but, of course, that would have been the assumption, that it would be their case anyway.

[Q. 53.] I can see the force, that there are political reasons in their broadest sense why entry might not have been made to the embassy. I was asking you in your capacity as a lawyer whether there were any legal reasons why we could not, once you concede the right of self-defence, and do I take it that your answer actually is legally probably, if not certainly, no reason why in self-defence the embassy could not have been entered and persons seized?

(*Sir John Freeland.*) I would prefer to stand on what I said before, namely, I can see a justification quite clearly in a case where there is continuing violence from embassy premises. It seems to me to get rather more difficult in a case where there has been violence and there remains the opportunity to try to find other means of preventing a recurrence.

(*Parliamentary Papers*, 1984-5, HC, Paper 127, pp. 27-9)

### **Part Thirteen: II. A. Coercion and use of force short of war—collective measures—regime of the United Nations**

(See also Part Three: I. A. 2. (item of 13 December 1984), above)

On 19 December 1983, certain member States of the United Nations submitted to the Security Council a draft resolution (S/16226) relating to South African involvement in Angola, the last preambular paragraph of which read as follows:

*Conscious of the need to take effective measures to maintain international peace and security in view of South Africa's continued violation of the Charter of the United Nations; . . .*

Paragraph 2 of the draft resolution read as follows:

*Declares that the continued illegal military occupation of the territory of the People's Republic of Angola is a flagrant violation of the sovereignty, independence and territorial integrity of Angola and endangers international peace and security; . . .*

Speaking in the debate on the draft resolution in the Security Council on 20 December 1983, the United Kingdom Permanent Representative, Sir John Thomson, stated in part:

... the United Kingdom will vote in favour of the draft resolution, although we have reservations on certain points in it. My delegation does not consider that the last preambular paragraph and paragraph 2 fall within the provisions of Chapter VII of the United Nations Charter or constitute a finding or decision which has specific consequences under the Charter.

(S/PV. 2508, p. 15)

In the course of a statement in the Security Council on 13 December 1984 in explanation of vote on a recommendation by the Security Council committee established by Resolution 421 concerning the question of South Africa, the United Kingdom representative said:

The Security Council must pay scrupulous regard to the Charter, and must not lightly enter into areas such as Chapter VII measures.

We are, in principle, opposed to trade sanctions. Wide economic sanctions are difficult to enforce, lead to a hardening of views and tend to harm those who are poorest and most vulnerable. Trade, on the other hand, is a channel for widening mutual understanding and for exercising a moderating influence.

By adopting a non-mandatory resolution, directed against importers, the Council has pursued a realistic course. Let me stress that my own Government does not import arms from South Africa. I trust that the same is true for other members of the Security Council. Our message, as a Council, to States outside this organ is that they should follow suit.

(Text provided by the Foreign and Commonwealth Office)

**Part Thirteen: II. B. *Coercion and use of force short of war—collective measures—collective measures outside the United Nations***

In reply to the question 'Whether it is within the remit of NATO to protect, if necessary by force of arms, the demilitarised status of the Svalbard archipelago, which is part of the sovereign territory of Norway, a member of NATO', the Parliamentary Under-Secretary of State for the Armed Forces wrote:

The North Atlantic Treaty Organisation allies are committed, under Article 4 of the North Atlantic Treaty, to consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the parties is threatened.

(HL Debs., vol. 447, cols. 993-4: 6 February 1984)

In reply to the question whether the United Kingdom has any form of defence agreement with Sri Lanka, the Minister of State, Foreign and Commonwealth Office, wrote:

The only such agreement is the 1947 United Kingdom-Ceylon defence agreement. This provides that the two Governments may give to each other 'such

military assistance for the security of their territories, for defence against external aggression and for the protection of essential communications as it may be in their mutual interest to provide'.

It has never been invoked by either Government.

(HC Debs., vol. 58, Written Answers, col. 632: 27 April 1984; see also *ibid.*, vol. 52, Written Answers, col. 337: 20 January 1984)

**Part Fourteen: I. A. 3. *Armed conflicts—international war—resort to war—limitation and reduction of armaments***

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The United States and the Soviet Union have both undertaken to refrain from actions that undercut the unratified SALT II agreement. On 23 January President Reagan transmitted to the United States Congress a report that indicated areas where the Russians had laid themselves open to accusations that they had contravened the intentions of some arms control agreements, including SALT II. The Soviet Union responded by delivering an aide memoire to the Americans alleging their non-compliance with arms control agreements, including SALT II. Questions about compliance with the SALT agreements are regularly discussed between the two sides in the Standing Consultative Commission set up in 1972. Alleged breaches have not been reported to the United Nations.

(*Ibid.*, vol. 53, Written Answers, col. 300: 2 February 1984)

**Part Fourteen: I. B. 7. *Armed conflicts—international war—the laws of war—humanitarian law***

In reply to the question 'what recent representations have been made by Her Majesty's Government to the International Red Cross conference that the Red Shield of David Society should be admitted to the League of Red Cross Societies and should be fully recognised by the International Committee of the Red Cross within the terms of the first, second and fourth Geneva Conventions of 1949', the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We have made no representations on this matter. The International Committee of the Red Cross has no power to recognise a society using any emblem other than those defined in the conventions. We share the concern that the Israeli society is not a full member of the Red Cross movement but understand that there is already informal co-operation in Red Cross operations. We think it important not to take any action which might encourage the proliferation of separate national emblems.

(*Ibid.*, Written Answers, cols. 93-4: 30 January 1984)

In reply to a question, the Secretary of State for Foreign and Commonwealth Affairs wrote:

The United Nations Secretary-General arranged for a group of four independent experts to visit Iran and investigate Iranian allegations that Iraq had used lethal chemical weapons in the recent fighting. On the basis of their

unanimous report that chemical weapons have been used, the Security Council has issued a strong condemnation, and has called for scrupulous adherence to the obligations flowing from accession to the 1925 Geneva protocol.

The United Kingdom wholeheartedly endorses the Security Council's conclusion. No country is entitled to ignore its obligations under international agreements or disregard the rules and principles of humanitarian law which apply to armed conflict. Nor, on the other hand, should the intransigence of one side be allowed to block all avenues towards a peaceful settlement. The United Kingdom will support any serious prospects of mediation, particularly through the good offices of the United Nations Secretary-General.

(Ibid., vol. 57, Written Answers, col. 579: 4 April 1984; see also *ibid.*, vol. 58, Written Answers, cols. 190-1: 10 April 1984)

In the course of a statement on the subject of the annual economic summit, the Prime Minister, Mrs Margaret Thatcher, stated:

We also discussed the conflict between Iraq and Iran. We expressed our regret at the breaches of international humanitarian law which this conflict has brought.

(Ibid., vol. 61, col. 763: 12 June 1984)

**Part Fourteen: I. B. 10.** *Armed conflicts—international war—the laws of war—nuclear, bacteriological and chemical weapons*

In reply to the question 'Whether the United States had decided to develop nuclear weapons in outer space and, if so, what agreements and international resolutions were breached by this decision', the Parliamentary Under-Secretary of State for the Armed Forces wrote:

No, all states parties to the 1967 Outer Space Treaty, including the United States, one of the three depositary governments, have undertaken not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction. There is no reason to doubt the continuing commitment of all states parties to this treaty.

(HL Debs., vol. 447, col. 1449: 10 February 1984)

In reply to a question, the Minister of State, Foreign and Commonwealth Office, wrote:

The biological weapons convention of 1972 prohibits the development, production, stockpiling, acquisition and retention of bacteriological and toxin weapons. These prohibitions, together with that on means of delivery, amount to a ban on use.

(HC Debs., vol. 55, Written Answers, col. 139: 28 February 1984)

In reply to a question, the Minister of State for Information Technology wrote:

Together with our allies, the UK is committed to achieving a verifiable, comprehensive ban on chemical weapons.

Export licences would not be granted for licensable equipment which could be used in the manufacture or assembly of chemical weapons in cases where it was thought that the equipment was intended for such use.

(HC Debs., vol. 55, Written Answers, col. 343: 1 March 1984)

In the course of a debate in the House of Lords on the subject of chemical weapons, the Minister of State, Foreign and Commonwealth Office, Baroness Young, stated:

... in the negotiations at the Conference on Disarmament in Geneva on a ban on chemical weapons, the USSR have recently confirmed their acceptance of one aspect of routine on-site inspection. We now urge the Soviet Union to agree quickly on all remaining aspects of an effective and verifiable ban, so that the development, production and stockpiling of chemical weapons can be outlawed for all time. The Soviet Union is a party, as are we, to the 1972 Convention banning biological weapons. We are considering with other parties to the 1972 Convention how the compliance provisions may be improved.

(HL Debs., vol. 450, col. 337: 29 March 1984)

In reply to a question on the subject of the Iran-Iraq war, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote:

We condemn the use of chemical weapons wherever it occurs.

(HC Debs., vol. 57, Written Answers, col. 286: 29 March 1984).

In reply to a question, the Minister of State, Department of Trade and Industry, wrote in part:

The Government have noted with grave concern the report of a UN inspection team published on 26 March which confirms that chemical weapons have been used in the war between Iran and Iraq. The Government are strongly opposed to the use of such weapons and are determined that chemicals for their manufacture are not exported from the United Kingdom to either of these countries.

My right hon. Friend has therefore today made the Export of Goods (Control) (Amendment No. 6) Order providing that eight chemicals which could be used for the manufacture of chemical weapons may not be exported to Iran or Iraq without a licence from my Department. The order takes effect immediately.

(Ibid., vol. 58, Written Answers, cols. 339-40: 12 April 1984)

In reply to a question, the Parliamentary Under-Secretary of State for the Armed Forces wrote in part:

Paragraph 113 of the [Manual of Military Law] says that there is no rule of international law dealing specifically with the use of nuclear weapons, the use of which is governed by the general laws of war. A serviceman must obey any command which is justified by military law and which is not contrary to British or international law.

(HL Debs., vol. 455, col. 970: 16 October 1984)

In reply to a question, the Parliamentary Under-Secretary of State for the Armed Forces wrote in part:

The United Kingdom is a signatory to and fully supports the 1963 limited test ban treaty which bans the testing of nuclear weapons in all environments except underground.

(HC Debs., vol. 65, Written Answers, col. 743: 26 October 1984)

During a debate on 31 October 1984 in the Security Council on the subject of the Falkland Islands, the Permanent Representative of the United Kingdom to the United Nations, Sir John Thomson, referred to earlier remarks made by the Foreign Minister of Argentina and went on:

Hints about the introduction of nuclear weapons come oddly from a country that has not ratified the Treaty of Tlatelolco. May I remind the Assembly that we in the United Kingdom have ratified the two Additional Protocols of the Treaty. We have scrupulously observed our obligations under those Protocols, first, in not deploying nuclear weapons in the territories in which we are internationally responsible within the Treaty's zone of application and, secondly, in not deploying such weapons in the territories for which the Treaty is in force.

(A/39/PV. 45, p. 52)

#### **Part Fourteen: III. *Armed conflicts—self-defence***

(See also Part Thirteen: I. D. (item dated 15 February 1984), and Part Thirteen: I. E., above)

In reply to a question, the Prime Minister wrote:

We do not envisage keeping the 150 nautical mile protection zone around the Falkland Islands indefinitely, but we will not lift it prematurely. We need to be fully satisfied that Argentina renounces the future use of force, and have noted recent Argentine statements that they intend to pursue their claim by peaceful means.

(HC Debs., vol. 53, Written Answers, col. 12: 30 January 1984)

In a memorandum dated 27 March 1984 submitted to the Foreign Affairs Committee of the House of Commons, the Foreign and Commonwealth Office wrote:

On 22 July 1982, HMG announced the lifting of the 200-mile Total Exclusion Zone, established on 30 April, and its replacement by a Protection Zone of 150 miles. Through the Protecting Powers, we asked the Argentine authorities to ensure that their warships and military aircraft did not enter the Zone. Argentine civil aircraft and shipping were also requested not to enter the Zone unless by prior agreement with the British Government. They have never applied for such permission. In 1982 and 1983 there were several Argentine incursions into the Protection Zone; these included a well-publicised flight into the Zone in August 1983 by an Electra aircraft of the Argentine naval airforce. *Bona fide* applications to enter the Zone would be given serious consideration by the British authorities. (*Parliamentary Papers*, 1983-4. HC Paper 268-viii, p. 114)

The Prime Minister published the following text of her letter, dated 4 April 1984, to Mr Denzil Davies MP:

Thank you for your letter of 6 March about the sinking of the General Belgrano.

The background to this event is worth recalling. On 30 April the Total Exclusion Zone was established around the Falkland Islands. On 1 May attacks by Vulcan and Sea Harrier aircraft were carried out on Stanley airfield as part of the process of enforcing the Total Exclusion Zone. On the same day the Task Force came under attack for the first time from the Argentine airforce and some Argentine aircraft were shot down. We were all very conscious of the risk that these assaults on the Task Force would be backed up by attacks by surface ships and submarines of the Argentine Navy and by aircraft from their carrier, the 25 de Mayo. All British units were on maximum alert to deal with any naval or air attacks.

HMS Conqueror, on patrol south of the Falkland Islands, detected an Argentine oiler auxiliary which was accompanying the Belgrano on 30 April. She sighted the Belgrano for the first time on 1 May when it was accompanied by two destroyers armed with Exocet missiles. Paragraph 110 of Command 8758 describes the events of 2 May which led to the sinking of the cruiser. As Janet Young explained in the House of Lords on 13 July 1983, that account was not intended to say when the cruiser was first located. The essential point is that it was on 2 May that we had indications about the movements of the Argentine fleet which led the Task Force Commander, Admiral Woodward, to request a change in the Rules of Engagement to permit the Belgrano to be attacked outside the Total Exclusion Zone.

The circumstances on that day have been well described by Admiral Woodward in his lecture at the Royal United Services Institute on 20 October 1982:

‘Early on the morning on 2 May, all the indications were that 25 de Mayo, the Argentinian carrier, and a group of escorts had slipped past my forward SSN barrier to the north, while the cruiser General Belgrano and her escorts were attempting to complete the pincer movement from the south, still outside the Total Exclusion Zone. But Belgrano still had Conqueror on the trail. My fear was that Belgrano would lose the SSN as she ran over the shallow water of the Burdwood Bank, and that my forward SSN barrier would be evaded down there too. I therefore sought, for the first and only time throughout the campaign, a major change to the Rules of Engagement to enable Conqueror to attack Belgrano outside the Exclusion Zone.’

Ministers agreed to the proposed change in the Rules of Engagement at about 1 p.m. London time on 2 May. Orders were sent immediately to HMS Conqueror, which attacked the Belgrano at 8 p.m. London time. Because of the indications that the Belgrano posed a threat to the task force, her precise position and course at the time she was sunk were irrelevant.

The first indications of the possible Peruvian peace proposals reached London from Washington at 11.15 p.m. London time and from Lima at 2 a.m. London time on 3 May.

My comments on paragraph 3 about the first contacts with the Belgrano group go further than we have been prepared to do hitherto. I have only felt able to do this now as, with the passage of time, those events have lost some of their original operational significance.

Throughout the events described above it was a major concern of the

Government to protect by all the means available the Task Force which had been despatched to the South Atlantic with all-party support.

(HC Debs., vol. 58, Written Answers, cols. 383-4: 13 April 1984)

In his opening address on 24 April 1984, to the 25th (Extraordinary) Assembly of ICAO, the representative of the United Kingdom, Mr F. A. Neal, having discussed the law relating to the use of force against civil aircraft (see Part Eleven: II. A. 1., above), continued:

14. The inherent right of self-defence (which is recognised in Article 51 of the United Nations Charter) is confined within strict limits. Under general international law, as under national law, a minimum condition of resort to armed force in self-defence is 'an instant and overwhelming necessity for self-defence, leaving no choice of means, and no moment for deliberation'. Furthermore, the action taken must involve 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'. That is to say, the degree of force must be proportionate to the danger. The criteria I have just quoted were first enunciated in relation to the incident of the steamer *Caroline* as long ago as 1837, which involved the use of force by British soldiers. These criteria have met with general acceptance ever since. They were specifically endorsed by the Nuremberg Tribunal.

15. Applying these principles to a civil aircraft which has entered without permission the airspace of another State in the time of peace, can the use of force in self-defence ever be legitimate? Clearly it could be legitimate if the aircraft is making, or is about to make, an attack or is, for example, dropping paratroops. The aircraft would then in effect be operating as a military aircraft. Lives of persons not on board would be endangered. The State would be entitled to use force against it.

(Text provided by the Foreign and Commonwealth Office)

In reply to the question whether Her Majesty's Government will propose amendments to the Geneva Convention as regards the sinking of warships on the high seas during a state of war, the Prime Minister wrote:

I assume my hon. Friend is referring to the 1958 Geneva convention on the high seas. Nothing in that convention affects the right of self defence preserved in article 51 of the Charter of the United Nations.

(HC Debs., vol. 59, Written Answers, col. 199: 3 May 1984)

In reply to the question why Her Majesty's Government abstained on the resolution of the United Nations General Assembly about the peace proposals for El Salvador put forward by the FMNL/FDR on 16 December 1983, the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, wrote in part:

One paragraph of the resolution suggested that the supply of military assistance to a state which has an inherent right of self defence constituted interference detrimental to human rights in that country.

(Ibid., vol. 64, Written Answers, col. 698: 25 July 1984)

In the course of a letter, dated 19 September 1984, addressed to Mr George Foulkes MP, on the subject of the sinking of the Argentine cruiser *General Belgrano*, the Prime Minister, Mrs Margaret Thatcher, wrote:

To put the matter briefly, in April 1982 Argentina had attacked and invaded British territory; despite intense and continuing diplomatic efforts, Argentina refused to comply with a mandatory resolution of the United Nations Security Council to withdraw its forces; with all-party support, and in exercise of our inherent right of self-defence under Article 51 of the UN Charter, the British Government despatched the Task Force to the South Atlantic; by the end of April as it approached the Falkland Islands the Task Force was increasingly vulnerable to Argentine attack; by 2 May it had already been attacked by Argentine aircraft and there were clear and unequivocal indications that it was under further threat from a strong and co-ordinated pincer movement by the major units of the Argentine Navy, including the cruiser 'General Belgrano' and the aircraft carrier '25 de Mayo'. The then Argentine Operations Commander, South Atlantic, has since confirmed publicly that his warships had indeed been ordered to attack. No Government with a proper sense of responsibility could have refrained from taking appropriate measures to counter the threats to the Task Force, and to ensure its safety to the maximum extent possible. Risks could not be taken, especially when hostilities had been so clearly embarked upon by the Argentines. (HC Debs., vol. 65, Written Answers, cols. 469-70: 22 October 1984)

In an Annex to this letter published later in reply to a question asked in the House of Commons, the Prime Minister, Mrs Margaret Thatcher, wrote in respect of the Falkland Islands situation in 1982 as follows:

1. The threats which faced the Task Force at the end of April and the beginning of May 1982 can only be appreciated in the light of the situation in the South Atlantic at that time.
2. On 2nd April 1982, the process of diplomatic negotiations over the Falkland Islands was abruptly interrupted by Argentina's unprovoked armed invasion of the Islands. Having obtained control of the Islands, the Argentines then refused to comply with mandatory Resolution 502 of the United Nations Security Council, which demanded an immediate withdrawal of their forces.
3. In exercise of the inherent right of self-defence under Article 51 of the United Nations Charter, and in parallel with intense but ultimately unproductive diplomatic activity, the British Task Force was despatched at the beginning of April, with all-party support, following Argentina's action, which was wholly inconsistent with international law and the UN Charter. 28,000 British Servicemen and civilians eventually sailed in the Task Force; it was the foremost and continuing duty of the Government to take such decisions as were necessary to protect them as the events of the moment demanded.
4. On 7th April, the Defence Secretary had announced the establishment, as from 12th April, of a 200 nautical mile Maritime Exclusion Zone around the Falkland Islands; but it was made clear in the announcement that this was 'without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in exercise of its right of self-defence, under Article 51 of the United Nations Charter.' Mr. Nott told the House of Commons that if it became necessary, the British Government would use force to achieve the

objective of securing Argentine withdrawal. He added: 'We hope that it will not come to that. We hope that diplomacy will succeed. Nevertheless, the Argentines were the first to use force of arms in order to establish their present control of the Falklands . . .'

5. In late April 1982 the Task Force was strung out between Ascension Island and the Falklands and vulnerable to attack. On 23rd April 1982, the Government accordingly sent the following message to the Argentine Government, making it clear that the terms of the communication came into effect immediately:

'In announcing the establishment of a Maritime Exclusion Zone around the Falkland Islands, Her Majesty's Government made it clear that this measure was without prejudice to the right of the UK to take whatever additional measures may be needed in the exercise of its right of self-defence under Article 51 of the United Nations Charter. In this connection, HMG now wishes to make clear that any approach on the part of Argentine warships, including submarines, naval auxiliaries, or military aircraft which could amount to a threat to interfere with the mission of British Forces in the South Atlantic will encounter the appropriate response. All Argentine aircraft including civil aircraft engaging in surveillance of these British Forces will be regarded as hostile and are liable to be dealt with accordingly.'

It is clear from the above text that the warning applied outside the Exclusion Zone as well as within it. This message was notified to the United Nations Security Council and circulated accordingly on 24th April. It was also released publicly.

6. On 28th April 1982 the Government announced the establishment of a 200 nautical mile Total Exclusion Zone around the Falkland Islands, effective as from 30th April, which would apply to all Argentine ships and aircraft. The announcement again stressed that 'these measures are without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in exercise of its right of self-defence, under Article 51 of the UN Charter'.

7. On 30th April, Ministers met to consider the implications of the capability of the aircraft carried by the Argentine aircraft carrier, the '25 de Mayo', to threaten our forces from the air at substantial distances from the Argentine mainland. After the most careful consideration of the legal, military and political issues, Ministers decided that our forces should be permitted to attack the '25 de Mayo' on the high seas (that is both within and outside the Total Exclusion Zone), in circumstances in which it posed a military threat to the Task Force. As set out in paragraph 5 above, a warning that Argentine warships threatening the Task Force would meet with an appropriate response had already been delivered to the Argentine Government on 23rd April; and Ministers concluded that no further warning was needed. There is no truth in the suggestion that the Foreign Secretary and the Attorney General opposed or dissented from the decision of 30th April. But on 1st May, the day he left for Washington, the Foreign Secretary raised the need for a further warning to the Argentine Government. The matter had been taken no further, however, when the general situation changed completely: first, with the attacks which the Argentine Air Force launched for the first time on the Task Force on 1st May and second, with the clear and unequivocal indications which became available that weekend that the Argentine Navy was committed to hostile action against the Task Force.

8. On 1st May 1982 the Task Force came under attack for the first time from the Argentine airforce, operating from the mainland. As the Defence Secretary said in the House of Commons on 4th May: 'On 1st May the Argentines launched attacks on our ships, during most of the daylight hours. The attacks by Argentine Mirage and Canberra aircraft operating from the mainland were repulsed by British Sea Harriers. Had our Sea Harriers failed to repulse the attacks on the Task Force, our ships could have been severely damaged or sunk. In fact, one Argentine Canberra and one Mirage were shot down and others were damaged. We believe that another Mirage was brought down by Argentine anti-aircraft fire. One of our frigates suffered splinter damage as a result of the air attacks and there was one British casualty whose condition is now satisfactory. All our aircraft returned safely. On the same day, our forces located and attacked what was believed to be an Argentine submarine which was clearly in a position to torpedo our ships. It is not known whether the submarine was hit. The prolonged air attack on our ships, the presence of an Argentine submarine close by, and all other information available to us, left us in no doubt of the dangers to our Task Force from hostile action'. All British units were on maximum alert to deal with any naval or air attacks.

9. As Admiral Woodward has explained 'Early on the morning of 2nd May, all the indications were that the "25 de Mayo", the Argentine Carrier, and a group of escorts had slipped past my forward SSN barrier to the north, while the cruiser General Belgrano and her escorts were attempting to complete the pincer movement from the south, still outside the Total Exclusion Zone.' The Argentine Operations Commander in the South Atlantic at the time, Admiral Juan Jose Lombardo, confirmed without hesitation on the BBC Panorama programme on 16 April this year that the Argentine Navy, as we thought, were attempting to engage in a pincer movement against the Task Force, using the '25 de Mayo' and its escorts in the north and the 'General Belgrano' and its escorts attempting to complete the movement from the south.

10. As was further explained in the Prime Minister's letter to Mr. Denzil Davies, HMS Conqueror had sighted the Belgrano for the first time on 1st May. On 2nd May, in response to the threat to the Task Force, Admiral Woodward sought a change to the Rules of Engagement to enable Conqueror to attack the Belgrano outside the Exclusion Zone. On the basis of the clear and unequivocal indications available to the Government that the Argentine Navy posed a real and direct threat to the Task Force and those sailing with it and on the advice of their most senior military advisers, Ministers decided at 1 pm that the Rules of Engagement should be changed to permit attacks on all Argentine naval vessels on the high seas, as had previously been agreed for the '25 de Mayo' alone (see paragraph 7 above). The necessary order conveying this change was sent by Naval Headquarters at Northwood to HMS Conqueror at 1.30 pm (all timings in this and the following paragraphs are given in London time). Shortly after 3 pm, HMS Conqueror reported the position of the Belgrano at 9 am and 3 pm that day. HMS Conqueror had not then received the order changing the Rules of Engagement. The limitations in communications with our submarines operating in the far South Atlantic meant that submarine operations there could not be monitored and controlled hour by hour. It was not until after 5 pm that HMS Conqueror reported that she had received and understood the new order and intended to attack. The Belgrano was attacked just before 8 pm.

11. Conqueror's report on the Belgrano's position was received by Northwood at 3.40 pm and made known to senior naval officers there and at the Ministry of Defence later that afternoon. The report showed that the Belgrano had reversed course. But she could have altered course again and closed on elements of the Task Force, acting in concert with the carrier to the north. In the light of the continued threat posed by Argentine naval forces against the Task Force, the precise position and course of the Belgrano at that time was irrelevant. For this reason, the report was not made known to Ministers at the time.

12. No evidence has at any time become available to the Government which would make Ministers change the judgement they reached on 2nd May that the Belgrano posed a threat to the Task Force. In the Panorama interview which is referred to earlier, Admiral Lombardo stated that the decision to sink the Argentine cruiser had been tactically sound, and one which he too would have taken had he been in Britain's position. It is, of course, the case that after the sinking of the Belgrano major Argentine warships remained within 12 miles of the Argentine coast and took no further part in the campaign.

13. As to subsequent operations by HMS Conqueror, immediately after the attack upon the Belgrano Conqueror herself came under attack from the Argentine escorting destroyers and, to evade this, moved away from the area. As her continuing role was to protect the Task Force from the threat posed by Argentine warships, she subsequently patrolled to the north and west of the area where the Belgrano had been sunk; when on 4th May Conqueror signalled that she was returning to that area, she was ordered not to attack warships engaged in rescuing survivors from the Belgrano.

14. Attention has been focussed on inaccuracies in the statement made by the then Defence Secretary, Mr. Nott, in the House of Commons on 4th May. It should be borne in mind that this statement had to be prepared in fast-moving and sometimes confused circumstances while Ministers were preoccupied with continuing threats to the Task Force. It was explained in the letter to Mr. Denzil Davies why it was then possible to correct earlier statements which were made in good faith and to give further information about the Conqueror's operation. It would have been inappropriate to have given details at the time about the circumstances in which Conqueror detected and tracked the Belgrano and other aspects of the engagement since these could well have provided information valuable to the Argentine Navy.

15. The need to do everything we could to protect the lives of some 10,000 British personnel—Service and civilian then in the Task Force and at risk from the Argentine Navy—was the sole reason for the attack on the Belgrano. No other consideration entered the calculations of the Ministers concerned, and in particular there was no question of taking the action in order to undermine peace proposals put forward by the President of Peru, about which Ministers in London had no knowledge at the time. As has been frequently made clear the first indications of these proposals did not reach London from Washington until 11.15 pm London time on 2nd May—over three hours after the attack on the Belgrano—and from Lima until 2 am London time on 3rd May.

16. Diplomatic action was, however, also pursued vigorously. Every effort was made to secure by diplomatic means the objective of the withdrawal of the Argentine forces. As the Prime Minister said in the House of Commons on 29th April 1982, it was the British Government's earnest hope that this objective could

be achieved by a negotiated settlement. But by 29th April, the initiative of the US Secretary of State, Mr. Haig, had foundered on Argentine obduracy. On 30th April, he announced that the United States Government had had reason to hope that the United Kingdom would consider a settlement on the lines of the second set of proposals formulated by the US Government; but the Argentine Government had informed the Americans on 29th April that they could not accept it. As General Galtieri later explicitly admitted in an interview with an Argentine newspaper, Argentine domestic political opinion made it impossible for the Junta to agree to a solution that would entail the withdrawal of Argentine forces. The British authorities by contrast, continued the search for a negotiated settlement until 17th May.

17. The measures taken in late April and early May 1982 were designed clearly and exclusively to safeguard the lives of those serving with our forces, by responding to the threat posed to our ships in order to ensure, in particular, the safety of our two aircraft carriers on which the protection of the Task Force ultimately depended. There was no question of any attempt to destroy the prospects for a negotiated settlement.

(HC Debs., vol. 65, Written Answers, cols. 786-9: 29 October 1984)

In the course of a further letter, dated 8 October 1984, to Mr Foulkes, the Prime Minister wrote

You ask a number of questions about the reasoning behind the creation of the MEZ and the TEZ and the changes which were made in the Rules of Engagement. . . . At all times the Task Force had Rules of Engagement which enabled it to respond to the threat presented by Argentine forces, but the precise circumstances in which Argentine ships and aircraft could be engaged varied as the situation—and in particular the position of the Task Force and the threat which Argentine military forces could pose against it—developed. The warning which was issued to the Argentine Government on 23 April was reported to the United Nations on 24 April and met our obligations with regard to the attack on the *Belgrano*. The changes that were made in the Rules of Engagement took full account of diplomatic, military and legal considerations and of our best assessment of the threat.

(*Ibid.*, col. 469: 22 October 1984)

In reply to the question what criteria were used in establishing the maritime and total exclusion zones around the Falkland Islands and in particular to the use of 200 miles as the limit of the zone, the Prime Minister wrote:

The maritime exclusion zone established on 12 April 1982 was intended to assist in bringing an end to the illegal Argentine occupation of the Falkland Islands by denying the Argentine forces reinforcement and resupply from the mainland. The selection of a 200 nautical mile radius was judged at that time to provide sufficient scope for submarine operations to enforce the zone, without being excessively large. The total exclusion zone, established on 30 April 1982, followed directly from this.

(*Ibid.*, col. 471: 22 October 1984)

**Part Fifteen: I. *Neutrality, non-belligerency—legal nature of neutrality***

(See also Part Three: I. B. 2. (Written Answer of 22 February 1984), above)

In the course of a debate in the House of Commons on the subject of the Iran–Iraq war, the Minister of State, Foreign and Commonwealth Office, Mr Richard Luce, stated:

I repeat that our policy is one of neutrality and a refusal to sell lethal arms to either side. We believe that it would be both constructive and helpful if all nations followed that policy.

(Ibid., vol. 55, col. 998: 8 March 1984; see also HL Debs., vol. 451, col. 622: 2 May 1984; HC Debs., vol. 60, Written Answers, col. 26: 14 May 1984; and ibid., vol. 61, Written Answers, col. 332: 11 June 1984)

In reply to a question, the Parliamentary Under-Secretary of State for the Armed Forces wrote:

Her Majesty's Government have adopted a policy of strict neutrality in the conflict between Iran and Iraq. We do not supply lethal equipment to either side. All applications for export licences are rigorously scrutinised to ensure that lethal equipment is not supplied to Iran. No Iranian personnel are currently receiving military training from the Ministry of Defence, and any future requests for such training would be considered in the context of our policy of neutrality.

(HL Debs., vol. 451, col. 622: 2 May 1984)

## APPENDICES

I. MULTILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1984<sup>1</sup>

<i>Title</i>	<i>Place and Date</i>	<i>UK Signature</i>	<i>Text<sup>2</sup></i>
Convention for the Protection of the World Cultural and Natural Heritage	Paris, 23.11.1972	29.5.1984 (ratification)	TS No. 2 (1985) (Cmnd. 9424)
Convention on the Civil Aspects of International Child Abduction	The Hague, 25.10.1980	19.11.1984	Misc. No. 14 (1981) (Cmnd. 8281)
International Convention on the Harmonization of Frontier Controls	Geneva, 21.10.1982	1.2.1984	Misc. No. 8 (1984) (Cmnd. 9188)
1983 Amendments to Annexes I and II of the International Convention for Safe Containers of 2 December 1972	London, 13.6.1983	Entered into force for United Kingdom 1.1.1984	TS No. 20 (1984) (Cmnd. 9180)
International Tropical Timber Agreement	Geneva, 18.11.1983	29.6.1984	Misc. No. 11 (1984) (Cmnd. 9240)
Agreement on the Setting up of an Experimental Network of Ocean Stations (COST 43)	Brussels, 21.11.1983	21.11.1983	Misc. No. 12 (1984) (Cmnd. 9243)
Treaty amending, with regard to Greenland, the Treaties establishing the European Communities (with Protocol on special arrangements for Greenland)	Brussels, 13.3.1984	13.3.1984	EC No. 18 (1984) (Cmnd. 9283)
Convention on the Accession of the Hellenic Republic to the Convention on the Law applicable to Contractual Obligations of 19.6.1980	Luxembourg, 10.4.1984	10.4.1984	Misc. No. 21 (1984) (Cmnd. 9357)
Agreement amending the Annex to the Statute of the European School of 15.7.1957 laying down Regulations for the European Baccalaureate (with Protocol)	Luxembourg, 11.4.1984	11.4.1984	EC No. 21 (1984) (Cmnd. 9324)
Protocol on the Privileges of the European Foundation	Brussels, 24.7.1984	23.7.1984	EC No. 10 (1985) (Cmnd. 9491)
Provisional Understanding regarding Deep Seabed Matters (with Appendices) and Memorandum in Implementation of the Provisional Understanding	Geneva, 3.8.1984	3.8.1984	Not yet published

<sup>1</sup> Information supplied by the Foreign and Commonwealth Office. The table includes some agreements signed by the United Kingdom before 1984, where information was not previously available. The information is correct as at January 1985, although in some cases information available since that date has been included.

<sup>2</sup> Publication is in various series of United Kingdom Command Papers: namely, EC = European Communities Series; Misc. = Miscellaneous Series; TS = Treaty Series; Cmnd. = Command Paper number.

<i>Title</i>	<i>Place and Date</i>	<i>UK Signature</i>	<i>Text</i>
Protocol to the Convention on Long-Range Transboundary Air Pollution of 13.11.1979 on Long-term Financing of the Co-operative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP)	Geneva, 28.9.1984	20.11.1984	Not yet published
II. BILATERAL AGREEMENTS SIGNED BY THE UNITED KINGDOM IN 1984 <sup>1</sup>			
<i>Country and Title</i>	<i>Place and Date</i>	<i>Text<sup>2</sup></i>	
BAHAMAS Three Exchanges of Notes concerning HM Forces in the Bahamas	Washington, 5.4.1984	Not yet published	
BRAZIL Agreement on Certain Commercial Debts	Brasilia, 13.12.1984	TS No. 11 (1985) (Cmnd. 9455)	
BRUNEI Exchange of Notes concerning arrangements for future Air Services	Brunei, 1.1.1984	Not yet published	
CANADA Convention providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters	Ottawa, 24.4.1984	Canada No. 1 (1984) (Cmnd. 9337)	
CHINA, PEOPLE'S REPUBLIC OF Agreement on the Establishment of a British Consulate-General at Shanghai and a Chinese Consulate-General at Manchester	Beijing, 17.4.1984	TS No. 14 (1985) (Cmnd. 9472)	
Agreement for the Reciprocal Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains	Peking, 26.7.1984	TS No. 7 (1985) (Cmnd. 9439)	
Agreement on the Future of Hong Kong (with Joint Declaration and Annexes)	Peking, 19.12.1984	Draft text in Misc. No. 20 (1984) (Cmnd. 9352)	
COSTA RICA Agreement on Certain Commercial Debts	London, 12.3.1984	TS No. 40 (1984) (Cmnd. 9237)	

<sup>1</sup> Information supplied by the Foreign and Commonwealth Office. The table includes some agreements signed by the United Kingdom before 1984, where information was not previously available. The information is correct as at January 1985, although in some cases information available since that time has been included.

<sup>2</sup> Publication is in various series of United Kingdom Command Papers, including Treaty Series (TS) and Miscellaneous Series (Misc.). Cmnd. = Command Paper number.

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
COSTA RICA ( <i>cont.</i> ) Exchange of Notes constituting the United Kingdom/Costa Rica Loan 1973 Debt Rescheduling Agreement 1984	London, 20/25.9.1984	Not yet published
ECUADOR Agreement on Certain Commercial Debts	London, 18.6.1984	TS No. 73 (1984) (Cmd. 9350)
INDIA Exchange of Notes amending the Route Schedules annexed to the Air Services Agreement of 1.12.1951, as amended	New Delhi, 2.4.1984	TS No. 52 (1984) (Cmd. 9273)
IRELAND, REPUBLIC OF Agreement on the Reciprocal Holding of Stocks of Crude Oil and/or Petroleum Products	Dublin, 22.10.1984	TS No. 9 (1985) (Cmd. 9451)
Exchange of Notes constituting an Agreement concerning the addi- tion of routes to the Route Schedule annexed to the Air Services Agreement of 5.4.1946	Dublin, 7/30.11.1984	TS No. 6 (1985) (Cmd. 9436)
KENYA Exchange of Notes constituting the Status of Forces Agreement Exchange of Notes constituting an Agreement terminating the 1964 Agreement on Loan Service Personnel	London/Nairobi, 12.10.1984 Nairobi, 12.10.1984	TS No. 10 (1985) (Cmd. 9446) Not yet published
KOREA Agreement for Air Services	Seoul, 5.3.1984	TS No. 47 (1984) (Cmd. 9263)
KUWAIT Agreement for the Avoidance of Double Taxation on Revenues arising from the Business of International Air Transport	London, 25.9.1984	Not yet published
LIBERIA Agreement on Certain Commercial Debts Exchange of Notes amending the United Kingdom/Liberia Credit Agreement 1965	London, 26.1.1984 London, 29.2.1984	TS No. 24 (1984) (Cmd. 9192) TS No. 62 (1984) (Cmd. 9327)
Agreement on Certain Commercial Debts	London, 8.10.1984	TS No. 82 (1984) (Cmd. 9410)
MALAWI Agreement on Certain Commercial Debts	London, 29.8.1984	TS No. 77 (1984) (Cmd. 9375)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
MALAYSIA Exchange of Notes terminating the Agreement for the Reference of Appeals from the Supreme Court of the Federation of Malaya to the Judicial Committee of the Privy Council dated 4.3.1958, as amended	Kuala Lumpur, 7.12.1984	TS No. 5 (1985) (Cmnd. 9435)
MOROCCO Agreement on Certain Commercial Debts	London, 17.10.1984	TS No. 79 (1984) (Cmnd. 9394)
MOZAMBIQUE Exchange of Notes amending the United Kingdom/Mozambique Project Loan 1977 (Amendment 1983)	Maputo, 29.9/12.11.1983	TS No. 81 (1984) (Cmnd. 9398)
NIGER Agreement on Certain Commercial Debts	Paris, 11.10.1984	TS No. 1 (1985) (Cmnd. 9418)
NORWAY Exchange of Notes concerning the Transfer of Nuclear Material from the United Kingdom to Norway	Oslo, 15.6/3.7.1984	TS No. 72 (1984) (Cmnd. 9346)
PAKISTAN Exchange of Notes amending the Air Services Agreement of 29.5.1974	Islamabad, 13.9.1982/31.10.1983	TS No. 36 (1984) (Cmnd. 9220)
PERU Agreement on Certain Commercial Debts	London, 12.3.1984	TS No. 39 (1984) (Cmnd. 9232)
PHILIPPINES Exchange of Notes terminating the Air Services Agreement of 31.1.1955, as amended	Manila, 29.10/2.11.1984	TS No. 83 (1984) (Cmnd. 9456)
ST LUCIA Exchange of Notes extending to Hong Kong, the Bailiwicks of Jersey and Guernsey, the Isle of Man, the Cayman Islands, and the Turks and Caicos Islands, the Agreement for the Promotion and Protection of Investments signed at Castries on 18.1.1983	Bridgetown/Castries, 8.2/23.10.1984	Not yet published
SENEGAL Agreement on Certain Commercial Debts	London, 11.1.1984	TS No. 18 (1984) (Cmnd. 9201)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
SPAIN Exchange of Notes constituting an Agreement on the Export of twenty-six Tonnes of Enriched Uranium Dioxide Powder from the United Kingdom to Spain (Salamanca Nuclear Fuel Fabrication Plant)	Madrid, 18.10.1984	Not yet published
SUDAN Agreement on Certain Commercial Debts	Khartoum, 25.1.1984	TS No. 38 (1984) (Cmnd. 9231)
SWEDEN Two Exchanges of Notes concerning Transfers of Nuclear Material from Sweden to the United Kingdom and from the United Kingdom to Sweden	London, 16.5.1984	TS No. 59 (1984) (Cmnd. 9307) and TS No. 60 (1984) (Cmnd. 9308)
TOGO Agreement on Certain Commercial Debts	London, 9.2.1984	TS No. 37 (1984) (Cmnd. 9229)
TURKEY Exchange of Notes amending the United Kingdom/Turkey Project Aid Loan 1983	Ankara, 20.8/20.9.1984	TS No. 3 (1985) (Cmnd. 9426)
UNITED STATES OF AMERICA Agreement on Social Security (with Administrative Agreement)	London, 13.2.1984	TS No. 8 (1985) (Cmnd. 9443)
Exchange of Notes on United Kingdom Access to the Atlantic Undersea Test and Evaluation Centre (AUTECE)	Washington, 5.4.1984	Not yet published
Amendment to the Agreement of 3.7.1958, as amended, for Co-operation on the Uses of Atomic Energy for Mutual Defense Purposes	Washington, 5.6.1984	TS No. 4 (1985) (Cmnd. 9434)
Exchange of Letters concerning the Cayman Islands and Matters concerned with, arising from, related to, or resulting from any Narcotics Activity referred to in the Single Convention on Narcotic Drugs 1961, as amended by the Protocol amending the Single Convention on Narcotic Drugs 1961	London, 26.7.1984	TS No. 70 (1984) (Cmnd. 9344)
VANUATU Exchange of Notes: the Santo Compensation Agreement	Port Vila, 13.3.1984	TS No. 55 (1984) (Cmnd. 9293)
YUGOSLAVIA Agreement on Certain Commercial Debts	London, 6.12.1984	TS No. 13 (1985) (Cmnd. 9463)

<i>Country and Title</i>	<i>Place and Date</i>	<i>Text</i>
ZAIRE, REPUBLIC OF Agreement on Certain Commercial Debts	Kinshasa, 14.11.1984	Not yet published
ZAMBIA Exchange of Notes modifying the Public Officers' Pensions (Zambia) Agreement 1978	Lusaka, 10.5/30.12.1983	Not yet published
MISCELLANEOUS ORGANIZATIONS Exchange of Notes with the Director-General of the Multinational Force and Observers concerning the Extension of the Commit- ment of the British Component of the Multinational Force in the Sinai	Rome/London, 12/19.4.1984	TS No. 53 (1984) (Cmnd. 9299)
Exchange of Notes with the European Organization for the Safety of Air Navigation (EUROCONTROL) amending Article 2 of the Bilateral Agreement relating to the Collection of Route Charges signed at Brussels on 8.9.1970	Brussels, 29.11.1984	Not yet published

### III. UNITED KINGDOM LEGISLATION DURING 1984 CONCERNING MATTERS OF INTERNATIONAL LAW<sup>1</sup>

**The Data Protection Act** (1984 c. 35) implements the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981. (See Part One: II. D., above.)

**The Foreign Limitation Periods Act** (1984 c. 16) provides for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determinations by foreign courts, as a matter of substance rather than as a matter of procedure.

**The Inshore Fishing (Scotland) Act** (1984 c. 26) makes fresh provision for Scotland as regards the regulation of inshore sea fishing. By section 9, 'Scottish inshore waters' means the sea adjacent to the coast of Scotland and to the landward of a limit of six miles from the baseline from which the breadth of the territorial sea is measured, up to the mean high-water mark of ordinary spring tides.

**The Prevention of Terrorism (Temporary Provisions) Act** (1984 c. 8) repeals and re-enacts with amendments the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1976. Amongst the amendments is the extension of the special powers of arrest, detention and examination in Part IV of the Act to 'international' terrorists; by section 12 (3), the acts of terrorism to which Part IV applies are '(a) acts of terrorism connected with the affairs of Northern Ireland; and (b) acts of terrorism of any other description except acts connected solely with the affairs of the United Kingdom or any part of the United Kingdom other than Northern Ireland'. (See Part Eight: II. D. (item of 25 January 1984), above.)

**The Public Health (Control of Diseases) Act** (1984 c. 22), which consolidates certain enactments relating to the control of disease and to the establishment and functions of port health authorities, provides in section 9 that certain sections of the Act shall apply to vessels in inland and coastal waters except (a) any vessel belonging to Her Majesty or under the command or charge of an officer holding Her Majesty's commission, or (b) any vessel belonging to a foreign government. By section 74, 'coastal waters' means waters within three nautical miles from any point on the coast measured from the low-water mark of ordinary spring tides, and 'inland waters' includes rivers, harbours and creeks.

**The Repatriation of Prisoners Act** (1984 c. 47) provides for facilitating the transfer between the United Kingdom and places outside the British Islands of persons for the time being detained in prisons, hospitals or other institutions by virtue of orders made in the course of the exercise by courts and tribunals of their criminal jurisdiction. Its provisions apply only where the United Kingdom is a party to international arrangements providing for such transfer.

<sup>1</sup> Compiled by C. A. Hopkins.

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